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United States

Exhibits in case
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Circuit Court of Appeals

For the Ninth Circuit.

UNION PACIFIC RAILROAD COMPANY, a
corporation,

Appellant,

vs.

ALBERT G. STANGER and PHYLLIS
STANGER,

Appellee.

Transcript of Record


Upon Appeal from the District Court of the United
States for the District of Idaho,
Eastern Division.

FILED

APR - 2 1942

PAUL P. O'BRIEN,

CLERK



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In the District Court of the Fifth Judicial District
of the State of Idaho, in and for the County
of Bannock.

No. 1149

ALBERT G. STANGER and PHYLLIS
STANGER,

Plaintiffs,

vs.

UNION PACIFIC RAILROAD COMPANY,
Defendant.

COMPLAINT

Plaintiffs for cause of action against the defendant complains and alleges:

I.

That at all times hereinafter mentioned the plaintiffs were and still are husband and wife, and citizens and residents of the State of Idaho.

II.

That at all times hereinafter mentioned the defendant was and still is a corporation, duly organized and existing under the laws of the State of Utah, and duly authorized and qualified to do business in the State of Idaho by having complied with the Constitution and laws of the State of Idaho with respect to foreign corporations.

III.

That the defendant is a common carrier of freight and passengers and owns large and extensive lines, or system of railroads, commencing at Butte, Montana, on the north and extending through the State of Idaho, through the State of Utah and on to Los Angeles, California, on the south; and commencing at Portland, Oregon, on the west and extending through to Council Bluffs, Iowa, on the east; together with divers and numerous branch lines, running off and extending from said main lines; and among other lines, one running through the City of Denver in the State of Colorado. [1*]

IV.

That on the 13th day of January, 1940, the plaintiffs purchased of and from the defendant, as a common carrier, a passenger ticket for the plaintiff Phyllis Stanger to ride upon its trains from Idaho Falls, Idaho, at the point where said ticket was purchased, over the defendant's lines, through the states of Idaho and Wyoming and into Colorado, to the City of Denver, and then on south, over other lines to Houston, Texas; that the plaintiffs purchased said ticket of and from the defendant and paid the full fare therefor.

V.

That pursuant to the privilege granted by said ticket, the plaintiff Phyllis Stanger boarded one of

*Page numbering appearing at foot of page of original certified Transcript of Record.

the defendant's trains and a Pullman attached thereto, and rode therein from Idaho Falls to a point within approximately thirty miles of the City of Denver in the State of Colorado, which was at said time and place upon the said defendant company's line of railroad, and in one of the defendant's trains, and upon which the plaintiff Phyllis Stanger was a passenger for hire at said time and place, at which said point said train, through the negligence, carelessness, and heedlessness of the defendant, its agents, servants, and employees, acting in the line, course, and scope of their employment; and by reason of the defective equipment, roadbed, and tracks, said train derailed and left the tracks at said point, approximately thirty miles from the City of Denver, State of Colorado.

VI.

That at said time and place, and while the plaintiff Phyllis Stanger was a passenger upon the defendant company train for hire, as aforesaid, the plaintiff Phyllis Stanger received the permanent, painful, and excruciating injuries hereinafter set out with greater particularity, as a proximate result of the negligence of the defendant, its agents, servants, and employees, while acting within the line, course, and scope of their employment. [2]

VII.

That at said time and place said train derailed and left said track and the trucks under the car

upon which the plaintiff, Phyllis Stanger, was riding, or the trucks under the car immediately ahead thereof, as to which the plaintiffs are not advised, but which is well known to the defendant, came out from under said car and along and up to the side of the coach or car in which the plaintiff Phyllis Stanger was riding, and did collide with and strike the same, and did then and there throw and cast and crush the plaintiff, Phyllis Stanger, against parts of said car or coach, in which she was riding, and did then and there injure her spine, back, shoulders, and legs, and injured her internally; and did then and there inflict severe and permanent injuries upon her nervous system, and did render her sick, sore, and lame, and she did suffer from said injuries and has suffered ever since receiving the same, and will continue to suffer therefrom so long as she may live; and she has been rendered unable to rest or sleep at night; and has been made extremely nervous; and that by reason of said injuries, the plaintiff, Phyllis Stanger, has lost a great amount of weight; that by reason of said injuries she has been caused to sustain a great amount of flow incidental to monthly periods, and which has continued, and which she has been unable to have stopped until she sustained a surgical operation, which operation was made necessary by reason of said injuries received at said time and place; that by reason of said injuries to the female organs and operation of the said Phyllis Stanger, she has been rendered sterile.

VIII.

That in an effort to effect a cure of said Phyllis Stanger, and required to perform said operation, the plaintiffs were compelled to and did employ doctors, physicians, and surgeons, and nurses, and purchased medicines, and did place said Phyllis Stanger in a hospital, upon the advice of the said plaintiff's doctors; and that the amount of said doctors' bills, hospital bill, nurses' bills, and medicines were as follows, to-wit: Doctors' bills \$339.00; [3] nurses' bills, \$150.00; hospital bill, \$191.80, miscellaneous drugs, bandages, etc., \$152.50; that it was necessary for the plaintiff Phyllis Stanger, by reason of said injuries, to have two blood transfusions and certain injections preliminary thereto, and said injections and transfusions were necessary for and preliminary^e to the operation hereinbefore mentioned; that the plaintiffs were required to lay out and expend for said injections and blood transfusions the sum of \$125.00.

IX.

That prior to receiving said injuries, the plaintiff Phyllis Stanger was always able to and did perform her household duties, or the greater portion thereof; that after receiving said injuries she was unable to do so, and plaintiffs were compelled to employ extra help to perform the work around the home of the plaintiffs, which, up to April 4, 1941, amounted to the sum of \$735.00; and the plaintiffs have been since said time, and will in the future be required to employ extra help to perform

work and labor around their home, for which they will be compelled to lay out and expend wages.

X.

That at the time of the derailment of said train, and the injury sustained by the plaintiff Phyllis Stanger, the clothes and luggage of the plaintiff Phyllis Stanger were damaged and destroyed and her wrist watch and other effects were damaged and destroyed; that the reasonable value of the clothes, wrist watch, and other effects of the plaintiff Phyllis Stanger that were damaged and destroyed at said time and place, by reason of said wreck and derailment, was the sum of \$195.00.

XI.

That all of the sums laid out and expended by the plaintiffs for doctors' bills, hospital bills, nurses' hire, and medicines, employment of help around the home of the plaintiffs, and for said injections and blood transfusions were reasonable for the services rendered by the persons by whom such services were rendered. [4]

XII.

That in addition to the damages aforesaid, the plaintiff, Phyllis Stanger, has suffered general damages in the sum of \$50,000.00.

XIII.

That all of the damages sustained by reason of the premises were proximately caused by the negligence, carelessness, and heedlessness of the defendant, its

agents, servants, and employees, while acting within the line, course, and scope of their employment.

Wherefore plaintiffs pray judgment against the defendant for the sum of \$1,888.30 special damages, and general damages in the sum of \$50,000.00, costs of suit and general relief.

JOHN FEREBAUER,
Res. Idaho Falls, Idaho.
ANDERSON, BOWEN &
ANDERSON,
Res: Pocatello, Idaho
Attorneys for Plaintiff.

State of Idaho
County of Bonneville—ss.

Albert G. Stanger, being first duly sworn, deposes and says: That he is one of the plaintiffs in the above and foregoing complaint; that he has read the same, knows the contents thereof, and that the same are true as he verily believes; that he makes this verification for and on behalf of himself and of his wife, the co-plaintiff herein.

A. G. STANGER.

Subscribed and Sworn To before me this 14th day of July, 1941.

(Seal) GEO. W. EDGINGTON,
Notary Public for Idaho
Res: Idaho Falls, Idaho.

[Endorsed]: Filed in County Court July 16, 1941.

[Endorsed]: Filed in U. S. District Court August 11, 1941. [5]

[Title of County Court and Cause.]

ANSWER

Comes now the defendant, Union Pacific Railroad Company, and for answer to the complaint filed herein, admits, denies and alleges as follows:

I.

Admits the allegations contained in paragraphs I, II and IV of said complaint.

II.

Defendant denies each and every allegation contained in paragraphs VI, VII, XI and XIII of said complaint.

III.

Answering paragraph III of said complaint, defendant admits that it operates a line of railroad from Butte, Montana extending through the States of Idaho and Utah and to Los Angeles, California, and from Portland, Oregon to Council Bluffs, Iowa, with numerous branch lines extending off to different points and places and among others the city of Denver, in the State of Colorado.

IV.

Answering paragraph V of said complaint, defendant admits that the plaintiff Phyllis Stanger boarded one of defendant's trains at Idaho Falls, Idaho, and rode over defendant's line of railroad in a Pullman car to a point within approximately

30 miles of the City of Denver, State of Colorado, when certain cars of the train upon which said plaintiff was riding were derailed. Defendant denies [6] each and every allegation contained in said paragraph.

V.

Answering paragraph VIII of said complaint, defendant denies each and every allegation contained therein, and specifically denies that the plaintiffs were damaged in the sum of \$339.00 for the doctors' bills, \$150.00 for nurses' bills, \$191.80 for hospital bills, \$152.50 for medicines, drugs, bandages, etc., and \$125.00 for injections and blood transfusions, or in any amount or at all.

VI.

Answering paragraph IX of said complaint, defendant denies each and every allegation contained therein and specifically denies that the plaintiffs were damaged in the sum of \$735.00 for extra help to perform work and labor around the home, or in any amount or at all.

VII.

Answering paragraph X of said complaint, defendant denies each and every allegation contained therein, and specifically denies that the plaintiff Phyllis Stanger was damaged in the sum of \$195.00 for loss of property as alleged in said paragraph, or in any amount or at all.

VIII.

Answering paragraph XII of said complaint, defendant denies that the plaintiff Phyllis Stanger suffered damages in the sum of \$50,000 or in any amount or at all.

IX.

Defendant denies each and every allegation contained in said complaint not hereinbefore expressly admitted or denied.

Wherefore said defendant having fully answered herein prays to be hence dismissed with its just costs and disbursements [7] herein incurred.

GEO. H. SMITH,
H. B. THOMPSON,
L. H. ANDERSON,
Attorneys for Defendant.

Residence & P. O. Address,

Attorneys for Defendants:

Geo. H. Smith,
Salt Lake City, Utah.

H. B. Thompson, and

L. H. Anderson,
Pocatello, Idaho.

(Duly verified)

[Endorsed]: Filed in County Court Aug. 4, 1941.

[8]

[Title of County Court and Cause.]

ORDER FOR REMOVAL

This cause coming on regularly for hearing upon the petition and bond of the defendant Union Pacific Railroad Company herein for an order transferring this cause to the United States District Court for the District of Idaho, Eastern Division, and it appearing to the court that said defendant Union Pacific Railroad Company has filed herein its petition for such removal in due form of law and that said defendant Union Pacific Railroad Company has filed its bond duly conditioned, with good and sufficient surety, as provided by law, and that said defendant has given the plaintiffs due and legal notice thereof, and it appearing to the court that this is a proper cause for removal to said United States District Court.

Now, Therefore, said bond is hereby approved and it is hereby ordered and adjudged that this cause be and it hereby is removed to the United States District Court for the District of Idaho, Eastern Division, and the Clerk is hereby directed to make up the record in said cause for transmission to said court forthwith.

Dated, this 7th day of August, 1941.

ISAAC McDOUGALL,
District Judge.

[Endorsed]: Filed in County Court Aug. 7, 1941.

[9]

[Title of District Court and Cause.]

OPINION

John Ferebauer, Idaho Falls, Idaho

Clyde Bowen, Pocatello, Idaho

W. H. Witty, Pocatello, Idaho

Attorneys for the Plaintiffs,

George H. Smith, Salt Lake City, Utah

H. B. Thompson, Pocatello, Idaho

L. H. Anderson, Pocatello, Idaho

Attorneys for the Defendant.

December 6, 1941

Cavanah, District Judge.

It appears that there were two cases brought, one for Albert G. Stanger and Phyllis Stanger husband and wife for alleged injuries to Phyllis Stanger and one by Albert G. Stanger for injuries claimed to have been received by him at the same time when traveling as passengers in a standard Pullman car on the train of the defendant. The two cases were consolidated for trial and proceeded under the above title.

The two issues presented were:

First: Was the defendant negligent in the manner alleged in the complaint? And

Second: If so, did the plaintiffs receive any injuries by reason of such negligence at the time of the accident?

The plaintiffs rely on the doctrine of *res ipsa loquitur* and urge that in the application of the rule that the present cases are within the class that

where the circumstances or the occurrence that has caused injury are of a character to give ground for reasonable inference that if due care had been employed by the defendant, charged [10] with care, the occurrence that happened would not have happened, and the defendant not having rebutted that, from the way in which the occurrence happened it may fairly be found to have been occasioned by negligence, and that where the defendant was engaged in carrying passengers, it must exercise the utmost care and diligence or the highest degree of care and prudence and foresight for the passengers' safety. On the other hand the defendant contends that the track and roadbed was in first class condition and that the derailment was caused by a broken wheel, the cause of which could not have been discovered by any known test or by any human foresight or experience, and therefore negligence was completely taken out of the case.

The accident having happened while plaintiffs were passengers on defendant's train, the presumption of negligence arises, if they were injured as a result of the derailment, which must be rebutted by the defendant, and the further principle that the railroad company owes the highest degree of care and the duty of inspection of its equipment to its passengers.

A fair analysis of the evidence as to these contentions will disclose that the defendant did not, prior to the accident use that degree of care of inspecting its equipment which the law requires, such

as the broken wheel and trucks under the cars and other equipment which contributed to the cause of the derailment.

This duty was upon the defendant when it accepts passengers and when we apply the doctrine of *res ipsa loquitur* it was upon the defendant to explain, which it did not, as stated, that the train wreck was not caused by any negligence on its part and therefore the conclusion must be reached that the cause of the accident was due to the negligence of the defendant.

— We then approach the question of, to what extent, if any, were the plaintiffs injured?

Referring to the claim of injuries of the plaintiff Albert G. Stanger, the evidence discloses that he did not receive any injury by reason of the accident as his conduct immediately after the [11] accident, up to the present time, shows that he has been very active, while on the trip following the accident, to Texas and Mexico, and since returning home. It is unnecessary to discuss the evidence in this respect for it is too clear in disclosing that the accident did not interfere with his usual activities while he was on such, and other pleasure trips, and since, in his usual and outstanding golf playing. He did not and does not now suffer from any injuries either permanent or temporary and therefore is not entitled to recover any amount from the defendant.

As to whether plaintiff Phyllis Stanger has suffered any injury by reason of the accident it seems

that she did receive injuries, as her physical condition since the accident has been such as to cause one to believe that the jar she received at the time of the accident did effect her as she was struck over the abdomen by the edge of a card table which they were using at the time, and that she immediately after the accident began to flow excessively, which continued until the time of her operation at which the Doctor removed the uterus which made her sterile, presenting a condition which is regarded as permanent, and deprives her of one of the natural gifts, and that the operation was necessary in order to stop the excessive flowing, and the nervous stress and pain under which she was suffering was all a contributing factor to the excessive flowing which was due to the accident and negligence of the defendant. She was, before the accident, a young woman, able to perform her regular duties as a housekeeper and after the accident she was for some time unable to do such work and was compelled to employ a maid until a few weeks before the trial. There is no doubt that she has suffered and received such injuries by reason of the accident and negligence of the defendant, and has been compelled to expend certain sums for maid assistance, Doctors, medicine and hospital bills.

Considering then, these sums so paid out and the reasonable compensation for the condition and the suffering which she has undergone, the sum of \$19,000.00 will be a reasonable amount to be awarded on account of her injuries which she re-

ceived by reason of the accident and negligence of the defendant; and costs.

This amount is awarded in case No. 1149.

[Endorsed]: Filed Dec. 6, 1941. [13]

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The above noted cases came on regularly for trial before the above entitled court without the intervention of a jury at the October, 1941, term of the above entitled court at Pocatello, Bannock County, Idaho. That there were two cases brought, one of Albert G. Stanger and Phyllis Stanger, husband and wife, for injuries to Phyllis Stanger, and one by Albert G. Stanger for injuries claimed to have been received by him. That the parties by written stipulation consented and agreed that the two cases may be consolidated for trial, the case of Albert G. Stanger vs. Union Pacific Railroad Company, a corporation, being case No. 1148, and Albert G. Stanger and Phyllis Stanger vs. Union Pacific Railroad Company, a corporation, being case No. 1149. That neither party demanded a jury and consented that the cases may be tried before the court without the intervention of a jury on all issues.

I.

That the court finds that the plaintiffs at all times mentioned herein were husband and wife and citizens and residents of Idaho Falls, State of Idaho. And that the defendant at all times herein mentioned is and was a corporation duly organized and existing under the laws of the State of Utah and by compliance with the constitution and laws of the State of Idaho with respect to foreign corporations, doing business in the State of Idaho, is authorized and qualified to do and transact business in the State of Idaho as a foreign corporation. [14]

II.

That on January 13 and 14, 1940, the defendant Union Pacific Railroad Company, a corporation, was engaged as a common carrier of passengers for hire in interstate commerce and transportation.

III.

That on January 13, 1940, the plaintiffs purchased of and from the defendant as such common carrier two passenger tickets paying the full price therefor entitling them to ride on defendant's passenger trains from Idaho Falls, Idaho through the State of Idaho, through the State of Wyoming and to Denver in the State of Colorado and on to Houston in the State of Texas. That on January 13, 1940, as aforesaid the plaintiffs boarded one of defendant's passenger trains at Idaho Falls, Idaho and rode in a standard pullman car, which car constituted a

part of one of defendant's passenger trains, from the City of Idaho Falls, Idaho to a point approximately 37 miles from the City of Denver in the State of Colorado, at which point on January 14, 1940, a number of the cars of defendant's said passenger train, including the standard pullman car in which the plaintiffs were riding, derailed or wrecked.

IV.

That at the time of the derailment or wreck the passenger train of the defendant consisted of a number of passenger cars, there being 7 or 8 passenger cars in said train, to which an engine was attached, and that at the time of the said wreck or derailment or immediately before, the said passenger train was traveling at a speed of between 60 and 65 miles per hour. The weather at the time of the derailment or wreck was cold and there was snow on the ground. At the time of the said wreck or derailment the said engine and cars were traveling upon the defendant's line of railroad and was under the care, management and control of the defendant company, its agents, servants and employees, who were then and there acting within the line, scope and course of their employment.

V.

That at the time of the accident or derailment or wreck the plaintiffs were seated in the seats of the standard pullman car. [15] The plaintiff Phyllis Stanger was facing the direction in which the train

was moving and her husband was seated directly across the table from her and were both seated next to the windows of said standard pullman car. Plaintiffs with two other persons who were riding upon said train were seated at a card table that had been furnished by the defendant company and were engaged, at the time of the wreck, in a game of cards. At the time the wreck or derailment occurred the plaintiff Phyllis Stanger was thrown suddenly and violently and without warning, forward, striking her in abdomen across and against the edge of said card table and was thrown with great force and violence against other parts of said car severely and permanently injuring her internally and bruising and inflicting upon her injuries about the back, legs and hand. The card table that had been furnished by the defendant as aforesaid and that was being used at said time and place by the plaintiffs was firmly attached to the side wall of the pullman car in at least two places by iron braces or attachments. The top of said table was approximately 27 inches above the floor of the standard pullman car and was approximately 2½ feet wide and approximately 3 feet long, the edge of the said table being approximately ½ inch in depth or thickness.

VI.

That at the time of the derailment or wreck the pullman car in which the plaintiffs were riding was derailed or left or was thrown from the rails upon

which it had been traveling and the end of the standard pullman car in which the plaintiffs were seated and riding left the rails of the railroad track and went down into the barrow pit and struck against a bank of solid or frozen earth that was approximately 4 feet high causing the said car to come to a sudden violent stop. The rails upon which said car had been traveling before being derailed were torn loose from the ties to which they had been attached and were twisted and bent. When the standard pullman car came to rest after the derailment it was in a tilted position and standing at an angle from the tracks. [16]

VII.

That at the time of the accident the plaintiff Phyllis Stanger was thrown forward violently against the edge of the card table that had been furnished for her use by the defendant company and struck her on and across her abdomen on and against the said card table with such force and violence that she very shortly thereafter, and before leaving the scene of the wreck, began to flow excessively. Which excessive flowing continued from the time immediately after the accident and until after her return home at Idaho Falls, Idaho and until she underwent a surgical operation by one Dr. Hatch at Idaho Falls, Idaho in July of 1940. That at the time the surgical operation was performed upon her by the said Dr. Hatch in July of

1940 her uterus was removed because of the said injuries received at the time of the accident, and the resultant excessive flowing, and the removal of her uterus thereby making her sterile, which condition is permanent and deprives her of a natural gift. That the removal of her uterus was necessary in order to stop or correct her excessive flowing of blood. That the nervous stress and nervous shock received at the time of the accident and derailment caused and greatly contributed to her excessive flowing. That at the time of the said accident and derailment the said Phyllis Stanger received great nervous shock and injury and experienced at said time and place severe nervous stress in addition to the actual physical injuries. And because of the excessive flowing and the length of time the same continued the said plaintiff Phyllis Stanger became physically weak and in a general run-down physical condition. That prior to the accident the plaintiff was a young woman approximately 28 years of age, the mother of three children and enjoying reasonably good health and was able to and did perform the greater portion of the ordinary duties of a housekeeper, wife and mother. [17]

VIII.

That after the accident and until a few weeks before the trial of this cause she was unable to perform her household duties because of her physical weakness and her nervous condition brought about by said physical weakness and her nervous

condition brought about by said excessive flowing and as a result of the injuries received in said accident, and the plaintiffs were compelled to and did employ a maid to perform the work about the house and home that the said Phyllis Stanger had theretofore performed prior to the accident.

IX.

That the excessive flowing that commenced immediately after said accident and all of the personal injuries received by the plaintiff Phyllis Stanger in said accident were proximately caused by and due to the negligence and carelessness of the defendant, its agents, servants, and employees acting within the line, course and scope of their employment. That the excessive flowing and the removal of the uterus of the said Phyllis Stanger thereby making the said plaintiff Phyllis Stanger sterile and the nervous shock and all of the personal injuries suffered and received by the said plaintiff Phyllis Stanger in said accident were due to and proximately caused by the negligence and carelessness of the defendant, its servants, agents and employees acting with the line, course and scope of their employment in failing in their duty of inspection of the passenger cars and equipment prior to the time the said accident occurred.

X.

That the plaintiff Albert G. Stanger in case No. 1148 herein did not receive any personal injuries by reason of the accident or derailment and he does

not now suffer from any injuries either permanent or temporary, received at the time of the wreck or derailment of the defendant's passenger train at the time and place aforesaid and the derailment of said standard pullman car in which he was riding as a paid passenger at the time and place aforesaid mentioned herein. [18]

XI.

That in an effort to effect a cure for the injuries of the plaintiff Phyllis Stanger a surgical operation was performed upon her and the plaintiffs incurred large expenditures of money for physicians and surgeons, hospital bills and nurse's hire and medicines, and the court finds that the sums laid out and expended for such services of physicians and surgeons and hospital bills and nurse's hire and medicines and hiring of help were reasonable for the service rendered.

XII.

That the defendant, its agents, servants and employees, at the time and place of the derailment mentioned herein and the accident that occurred and prior thereto owed to the plaintiffs who were riding as paid passengers on a regular passenger train in charge of, controlled and under the management of the defendant, its agents, servants, and employees a high degree of care for their safety, and the duty of inspection, control, maintenance and management of the passenger cars and the trucks underneath the same and all other equipment con-

nected therewith, and that if the defendant, its agents, servants and employees then and there acting within the line, course and scope of their employment had exercised and discharged to the plaintiffs that degree of duty and degree of care of inspection and maintaining and management and controlling of its passenger equipment and cars and trucks and other equipment connected therewith, prior to the time the accident occurred, that is required by the law of common carriers by rail engaged in the transportation of paid passengers on passenger trains for hire as under the facts and circumstances disclosed by the evidence herein, the derailment and the resulting injuries to the plaintiff Phyllis Stanger in case No. 1149 would not have occurred.

XIII.

The facts and circumstances of this case bring the plaintiffs within that class of cases that where the circumstances of the [19] occurrence that has caused injuries are of a character to give ground for reasonable inference that if due care had been employed by the defendant, charged with care, the occurrence that happened would not have happened, and gives ground for the reasonable inference in this case that if due care had been employed by the defendant, its agents, servants and employees, who were then and there charged with care in the inspection, maintenance, management and control of its passenger cars and of the equipment connected

therewith that the occurrence that happened would not have occurred. This presumption must be rebutted by the defendant. The defendant by its evidence in the case of Albert G. Stanger and Phyllis Stanger having failed to rebut the inference of negligence drawn from the facts and circumstances of this accident that due care, inspection and management and control had been employed by the defendant, its agents, servants and employees, the derailment and consequent injuries would not have occurred. That it appears clearly from a fair analysis of defendant's evidence that the defendant, its agents, servants and employees acting within the line, course and scope of their employment, did not, prior to the accident, exercise or use or discharge that degree of care of inspecting, maintaining, managing and operation of its passenger equipment that the law requires of it as under the facts and circumstances in these cases required. That all of the injuries and loss received by the plaintiff Phyllis Stanger aforesaid were proximately caused by and due to the negligence of the defendant, its agents, servants and employees while acting within the line, course and scope of their employment.

XIV.

That the plaintiff Phyllis Stanger suffered and sustained as a result of the derailment proximately caused by and due to the negligence and carelessness of the defendant, its agents, servants and employees, severe and permanent injuries that have caused,

since the time of the accident and will continue to cause her nervousness and physical suffering and discomfort so long as she may live. She [20] has suffered and sustained the permanent loss of a natural gift by the removal of her uterus by reason of the injuries she received at the time the accident occurred, thereby making her sterile. That the sum of \$19,000.00 is a reasonable sum for said injuries.

XV.

At the close of all of the evidence the defendant moved for a directed verdict, in both consolidated cases.

CONCLUSIONS OF LAW

The court concludes as a matter of law from the foregoing findings of fact:

I.

That the motion of the defendant for a directed verdict in case No. 1148, being Albert G. Stanger vs. Union Pacific Railroad Company, a Corporation, is granted. Defendant's motion for a directed verdict in case No. 1149, being Albert G. Stanger and Phyllis Stanger, plaintiffs, vs. Union Pacific Railroad Company, a corporation, defendant, is denied.

II.

That the defendant Union Pacific Railroad Company, a corporation, its agents, servants and employees while acting within the line, course and

scope of their employment were guilty of negligence and carelessness proximately causing and contributing to the injuries received by the plaintiff Phyllis Stanger and failed to exercise that degree of care, maintenance, and prudence and foresight in the inspection, management, and operation of its passenger equipment under the facts and circumstances of this case, that the law requires, and that the law did require of the defendant, its agents, servants and employees at the time and place the within accident occurred. That the defendant, its agents, servants and employees failed to exercise that degree of care, prudence, maintenance and foresight that the law requires of those engaged as common carriers by rail of said passengers on passenger trains as was the defendant in this case. [21]

III.

That as a matter of law the plaintiffs Albert G. Stanger and Phyllis Stanger in case No. 1149 are entitled to recover damages for the injuries and losses received by reason of the derailment or accident due to and occasioned by the negligence and carelessness of the defendant, its agents, servants and employees.

IV.

And under the facts made and herein found the sum of Nineteen Thousand Dollars (\$19,000.00) is lawful, reasonable and just as the amount which the plaintiffs should receive herein in case No. 1149.

Done at Boise, Idaho this 24th day of December, 1941.

CHARLES C. CAVANAH,
District Judge.

[Endorsed]: Filed Dec. 24, 1941. [22]

In the District Court of the United States, in and
for the District of Idaho, Eastern Division

No. 1149

ALBERT G. STANGER and
PHYLLIS STANGER,

Plaintiffs,

vs.

UNION PACIFIC RAILROAD COMPANY, a
corporation,

Defendant.

JUDGMENT.

This cause having been heard before the Court without the intervention of a jury and the Court having heretofore made its findings of fact and conclusions of law, and filed the same herein;

It Is Therefore, Upon the Findings and Order of the Court, Ordered, Adjudged and Decreed that the plaintiffs, Albert G. Stanger and Phyllis Stanger, in case No. 1149, do have and recover of and from the defendant Union Pacific Railroad Company, a cor-

poration, the sum of Nineteen Thousand Dollars (\$19,000.00), lawful money of the United States of America, and costs of suit taxed at \$23.45. And that execution is awarded for the collection of this judgment.

Witness the Honorable Charles C. Cavanah, Judge of said court, and the seal thereof this 24th day of December, 1941.

(Seal) W. D. McREYNOLDS,
Clerk, U. S. District Court.

[Endorsed]: Filed December 24, 1941. [23]

[Title of District Court and Cause.]

OBJECTIONS TO FINDINGS AND MOTION
TO AMEND FINDINGS AND CONCLU-
SIONS OF LAW

Comes now the defendant (at the time it serves and files its motion for new trial) and objects to the findings of fact and conclusions of law signed and filed in the above entitled cause, and moves the court to amend said findings, to make additional findings, and to make and enter judgment in favor of the defendant accordingly.

I.

Defendant moves the court to strike from the 11th line of paragraph V of said findings the words "and violently"; to strike from line 12 of said paragraph the words "the lower portion of"; to

strike from line 14 of said paragraph the words “with great force and violence”; to strike from the 15th and 16th lines of said paragraph the words “severely and permanently injuring her internally and”, for the reason that the evidence is insufficient to support the above quoted portions of said findings. Defendant moves to amend said paragraph V by adding thereto the following facts, which facts are undisputed and are material, to-wit: —“from the top of the seat to the top of the table, free height, 10 $\frac{1}{4}$ inches; from back of seat to back of seat, 57 $\frac{1}{2}$ inches; that the seat and back rests of the seat are all cushioned.”

II.

The defendant moves the court to strike from line 7 of paragraph VI of said findings the words “solid or” and to strike from line 8 of said paragraph the words “sudden violent” and to strike [24] from lines 13, 14, 15 and 16 the following: “and the trucks that had been underneath the said standard Pullman car were out from under said Pullman car when it came to a final stop”, for the reason that the evidence is insufficient to support the above quoted portions of said findings.

III.

Defendant moves the court to strike paragraph VII of said findings, and the whole thereof, for the reason that the evidence is insufficient to support said finding, and to substitute in place thereof the

following, for the reason that the evidence will support no other finding:

“That the plaintiff Phyllis Stanger, at the time of the derailment on January 14, 1940 at Houston, Colorado, was approximately 28 years of age, and was the mother of three young children, the birth of which successively was attended by her family physician, Dr. Mellor; that since the birth of the last child about March 1939 she had excessive menstruation and other symptoms of a fibroid uterus; that she went to Dr. Woolley at Idaho Falls on the 10th day of November, 1939, for treatment because of said excessive menstruation, at which time her blood count showed hemoglobin 42%; that said treatments consisted of injections to decrease the flow and that the latter part of the month her hemoglobin had raised to 56% and she felt better, said treatments were continued until December 14, 1939; that at the time of the derailment of the train on the 14th day of January, 1940, the said plaintiff was struck in the abdomen well above the pelvic cavity by the card table at which she was seated, but that there was no evidence of any injury, although said plaintiff commenced to flow thereafter; that said plaintiff and her husband and friends rode from the point of the derailment to the City of Denver, Colorado, in an automobile, where the said plaintiff and others were met by friends and later in the day a doctor treated said plaintiff, but how or of what the treat- [25] ments consisted, or what the disclosures of said Phyllis

Stanger to said physician were, or what the examination or diagnosis, if any, disclosed, is not in evidence; that thereafter and later in the day the said plaintiff and her husband went to the Horse Show and later returned to the Denver Athletic Club for dinner, after which the said plaintiff and her husband traveled by train to Houston, Texas, and there attended a Convention for several days, following which said plaintiff and her husband traveled by train to Mexico City, Mexico, where they went for a pleasure trip and stayed for three or four days seeing the sights; said plaintiff and her husband then returned to Idaho Falls by train via Los Angeles, California, and arrived at Idaho Falls, Idaho on or about the 29th day of January, 1940; that said plaintiff went to bed upon her return to Idaho Falls but had no medical treatment from the time she left Denver on the 14th day of January, 1940 until the 12th day of February, 1940; that on her return to Idaho Falls, or thereafter, she did not consult Dr. Woolley, who had been treating her prior to the time of the derailment, or Dr. Mellor, her family physician, but on the latter date consulted Dr. Hatch at Idaho Falls, Idaho, who found her hemoglobin to be 48%, and who treated her and who operated on her on the 9th day of July, 1940; that Dr. Hatch's preoperative diagnosis was chronic cervicitis and fibrosis uterus, and said surgical operation confirmed said preoperative diagnosis and consisted of conization of the cervix and a subtotal hysterectomy, and the re-

moval of the right ovary; that the pathological diagnosis of the removed organs and parts of organs was, 'Fibrosis uteri with diffuse endometrial hyperplasia, and chronic fibrous cervicitis and multiple follicular cysts of the ovary with corpus hemorrhagicum'; that said plaintiff Phyllis Stanger left the hospital on the 20th day of July, 1940, and her condition continued to improve and the flowing stopped upon said operation being performed; that said operation resulted in making her sterile, but that other treatments for her chronic condition [26] might also have made her sterile; that the removal of her uterus by said operation was necessary in order to stop or correct the flowing of blood from her uterus but that the condition of said uterus and the other organs removed by said operation was not caused by any injuries the said plaintiff Phyllis Stanger received at the time said derailment occurred, and that said removed organs were not injured as a result of said derailment; that the said plaintiff's excessive flowing was due to a chronic condition from which she was suffering prior to the time of the derailment and which only a surgical operation such as Dr. Hatch performed, or possibly radium or x-ray treatment, could cure; that said operation performed by Dr. Hatch did cure her condition; that any aggravation of said plaintiff's condition by reason of said derailment related solely to an aggravation of her pre-existing symptoms of the fibroid uterus and that such aggravation

would have been of a temporary duration and would not have existed for more than three or four days if the said plaintiff had gone to bed for a few days following the derailment, but that the said plaintiff did not do so or otherwise exercise the care for herself that she should have in view of the excessive flowing she complained about following the derailment.

IV.

Defendant moves the court to strike paragraph VIII of said findings, and the whole thereof, for the reason that said finding is immaterial and the evidence is insufficient to support said finding, the evidence being clear and uncontradicted that before the plaintiff Phyllis Stanger started on her said trip by train and prior to January 14, 1940, she had been flowing abnormally for an excessive length of time and that her condition subsequent to the said 14th day of January, 1940 was merely a continuation of said pre-existing condition for which a surgical operation or possibly radium or x-ray was the only cure, and for which Dr. Hatch did operate on the 9th day of July, 1940, and that after removing her uterus, or the part thereof that was fibroid, and which uterus was not injured at the [27] time of the derailment, the said flowing ceased and the trouble from which she was suffering prior and subsequent to the derailment, was cured.

Defendant in any event moves the court to strike from said paragraph VIII the following words:

“and as a result of the injuries received in said accident”, for the reasons set forth immediately above.

V.

Defendant moves to strike paragraph IX of said findings and the whole of said paragraph on the ground that the evidence is insufficient to support said findings and for the reasons set forth in paragraphs III and IV of this motion, and for the reason that said paragraph contains only conclusions of law and not statements of fact, and requests the court in lieu thereof to adopt, make and enter the following finding, to-wit:

“That on the 13th day of January, 1940, the day prior to the time the derailment occurred at Houston, Colorado, the section foreman of the defendant inspected the road bed, the track, including the switch and the frog, at the point said derailment occurred; that said railroad track was constructed upon a roadbed with a base of Sherman Hill gravel 8 to 10 inches in depth upon which was placed good and substantial ties and upon which there was laid rail of the 110 pound type, that each tie had tie plates on them and each tie plate was spiked to the rail and the ties; that said track was properly gauged and said track and road bed was in safe condition and was a portion of the main line track between Omaha, Nebraska and Denver, Colorado; that after said inspection was made there were numerous trains operated successfully over said

track up to the time the train in question was derailed; that said train approached and passed over said east switch of the track at Houston, Colorado at a speed of approximately 60 or 65 miles per hour, which was the usual and customary speed of said train; that said engine rode smoothly all the time and when said engine was some distance east of said switch the engineer [28] observed the emergency brakes of the train applied and upon looking back saw that the train had parted or broken in two, that several cars in the rear of the train were derailed but that the engine and four cars attached thereto were not derailed but stayed on the track; that the cars attached to said engine were inspected and no parts thereof were missing and all equipment underneath said cars were found to be intact except that the right rear wheel of the fourth car behind the engine and the last car back of the engine which was not derailed was broken and only a core of the wheel remained on the axle; that the broken parts of said wheel were found at various places east of the east switch and frog of the switch, and that said broken parts and the core of the wheel remaining on the axle established that all breaks were fresh, new and clean; that on the top of the right hand rail and about 20 feet east of the frog of the east switch there were two gouge marks and a short distance east thereof a rail or two was turned over and bent; that plaintiffs were riding in a standard Pullman car, which was the seventh or next to last car in

the train; that the broken parts of said wheel were picked up by defendant's employees and together with the core of the wheel left on the axle were immediately shipped to the Metallurgical Department of the laboratory of the defendant at Omaha, Nebraska, where all of said parts were inspected and the wheel carefully tested and analyzed both chemically and metallurgically, the result of which showed that chemically the wheel was well within the standards set up by all Class I railroads of the United States; that the metallurgical test established that said wheel broke because of internal stresses existing in the plate of said wheel; that said stresses are caused at the time said wheel is manufactured and that the only known test of determining such stresses is to saw through the wheel, as was done by the metallurgical engineer of the defendant when he tested said broken wheel; that the breaking of said wheel was the cause of said rails turning over and the consequent derailment of the train on which plaintiffs were riding on the 14th day of January, 1940; [29] that there is no test or inspection known except that test made by the metallurgical engineer which will disclose the stresses or condition which caused said wheel to break and that no human foresight or experience could have foreseen said condition and no inspection of said wheel prior to the time it broke at Houston, Colorado on the 14th day of January, 1940 would have disclosed said condition and that said condition of the wheel could not have been discovered

by the defendant or any of its agents, servants or employees in the exercise of the highest degree of care prior to the time said wheel broke at Houston, Colorado on the 14th day of January, 1940; that said wheel was a rolled steel wheel and that there are thousands of wheels of the same kind now, and for a long time past have been, in operation on all the Class I railroads in the United States and on the defendant's line of railroad, and that in the past 39 years there has been but two wheels break from the latent condition which caused the wheel in question to break.

VI.

Defendant objects to paragraph XI of said findings for the reason that the evidence is insufficient to support said finding; for the reason that the surgical operation performed upon the said Phyllis Stanger was not the result of injuries sustained by her in the derailment of defendant's train on the 14th day of January, 1940 but was for the purpose of correcting a condition existing prior to the time said derailment occurred, and for the further reason that said finding is indefinite in that it is not stated what amounts the plaintiffs incurred by way of expenditures, for which reason defendant moves the court to strike said finding in its entirety.

VII.

Defendant objects to and moves the court to strike paragraph XII of said findings in its en-

tirety for the reason that said paragraph contains no finding of any fact or facts but presents only a conclusion of law, is argumentative, redundant and immaterial.

VIII.

Defendant objects to and moves the court to strike para- [30] graph XIII of said findings in its entirety for the reason that said paragraph contains no findings of any fact or facts but presents only a conclusion of law, is argumentative, redundant and immaterial.

IX.

Defendant objects to and moves the court to strike paragraph XIV of said findings, and the whole thereof, for the reasons mentioned in paragraphs III, IV and V of said motion, and for the further reason that said finding is contrary to the undisputed or great weight of the evidence, and for the reason that the evidence is insufficient to support the findings therein contained; that the amount stated therein in any event is grossly excessive for the reason that the undisputed evidence shows that any aggravation which might have been caused by the derailment was merely an aggravation of the symptoms of the pre-existing condition of the plaintiff Phyllis Stanger, which aggravation would have been of slight consequence and for only a few days duration if she had exercised reasonable care for her own health and physical welfare, and

rested at Denver instead of foregoing rest or quiet upon arriving at said place, and thence immediately continuing on her journey to Houston, Texas, thence to Mexico City, sightseeing and returning to Idaho Falls via Los Angeles, California, and thereafter failing to consult a physician until approximately fourteen days after her arrival at Idaho Falls.

X.

Defendant moves the court to amend paragraph XV of said findings by striking all of said paragraph and substituting in place thereof the following:

“At the close of all of the evidence the defendant moved for judgment in its favor as to both consolidated cases upon the ground that the evidence is insufficient to sustain a recovery by either or both of the plaintiffs.”

for the reason that the record will support no other finding. [31]

XI.

Defendant objects to and moves the court to amend conclusion of law No. 1 to read as follows: “That the motion of the defendant for judgment in its favor in case No. 1148, being Albert G. Stanger, plaintiff, vs. Union Pacific Railroad Company, a corporation, defendant, and in case No. 1149, being Albert G. Stanger and Phyllis Stanger, plaintiffs, vs. Union Pacific Railroad Company, a corporation, defendant, should be granted.”, for the reason that

under the facts in this case the law will support no other conclusion.

XII.

Defendant objects to and moves the court to strike conclusions of law II, III and IV, for the reason that said conclusions are contrary to the law and the evidence is insufficient to support them and each of them, and requests the court to adopt, make and enter in lieu thereof the following conclusions:

“a. That the plaintiff Albert G. Stanger was not injured as a result of the derailment of defendant’s train at Houston, Colorado on the 14th day of January, 1940; that the injuries the plaintiff Phyllis Stanger sustained at the time the train derailed did not cause or produce the condition which necessitated the surgical operation performed by Dr. Hatch on July 9th, 1940, but that any condition caused by said derailment was only a temporary aggravation of the symptoms of her pre-existing condition for which an operation was the only cure, and that said temporary aggravation would have existed for not to exceed three or four days had the said plaintiff rested for that length of time instead of continuing on her journey, but that the cause of said operation was the existence of a chronic disorder from which she was suffering before embarking upon said journey.”

“b. That the derailment of the train upon which the plaintiffs were riding and which derailed at Houston, Colorado on the 14th day of January, 1940, was caused by a wheel on the right rear [32] trucks of the fourth car behind the engine of the train breaking, which wheel broke as the train was passing over the track in the immediate vicinity of the east switch and frog from internal stresses existing in the plate of said wheel, which stresses were latent and could not have been discovered by any known test, human foresight or experience, prior to said wheel breaking at Houston, Colorado, on the day in question, and such latent defect or condition could not have been discovered by defendant’s agents, servants or employees by the exercise of the highest degree of care prior to the time the wheel broke at Houston, Colorado on the day in question.”

“c. That the defendant rebutted the prima facie case made by the plaintiffs and the plaintiffs did not produce any further evidence of any negligence on the part of the defendant and accordingly the defendant was not negligent and is entitled to judgment in its favor and against the plaintiffs and each of them in cases 1148 and 1149.”

Said motion will be based upon the pleadings, files, records, minutes, testimony and other evidence in the case.

Dated at Pocatello, Idaho, December 30th, 1941.

GEO. H. SMITH,

H. B. THOMPSON,

L. H. ANDERSON,

Attorneys for Defendant.

Service and receipt of copy of the foregoing Objections to Findings and Motion to Amend Findings and Conclusions of Law is hereby admitted this 30th day of December, 1941.

JOHN FEREBAUER,

CLYDE BOWEN,

W. H. WITTY,

Attorneys for Plaintiffs.

[Endorsed]: Filed Dec. 31, 1941. [33]

[Title of District Court and Cause.]

ORDER

The objections of the defendant to the findings, and the motion to amend findings and conclusions of law, having been presented and after consideration of the same it is Ordered:

1. Objection to paragraph 5 of the findings is overruled excepting the request to strike from line 12 of said paragraph "the lower portion of" and inserting in lieu thereof "her in"

2. The motion to strike from paragraph 6 of the findings "and the trucks that had been underneath

said standard pullman car were out from under said pullman car when it came to a final stop" be sustained and the remaining portion of the motion relating to paragraph 6 is denied.

3. The motion to strike from paragraph 7 of the findings is denied, excepting the words on line 4 from the beginning of said paragraph "the lower portion of",

4. The motion to strike paragraphs 8, 9, 11, 12, 13 and 14 of the findings is denied.

5. The motion to strike paragraph 15 of the findings is denied, but said paragraph 15 of the findings is modified by inserting therein "as to both consolidated cases".

The objections and motion to amend the conclusions of law are denied.

Exception allowed defendant.

Dated January 23, 1942.

CHARLES C. CAVANAH
United States District Judge.

[Endorsed]: Filed January 23, 1942. [34]

[Title of District Court and Cause.]

ORDER

It is further ordered that paragraph 7 of the findings of fact be amended by striking the word "two" on line 4 from the bottom thereof and insert

in lieu thereof the word "three".

Dated January 23, 1942.

CHARLES C. CAVANAH
United States District Judge

[Endorsed]: Filed January 23, 1942. [35]

[Title of District Court and Cause.]

PETITION AND MOTION FOR
NEW TRIAL

Comes now the defendant Union Pacific Railroad Company, a corporation, and moves the court for an order setting aside judgment rendered herein and granting a new trial, on the following grounds:

I.

Insufficiency of the evidence to justify the decision, and that it is against law in this, to-wit:

That the evidence is insufficient to support the finding and conclusion of law that the defendant, its agents, servants and employees were guilty of negligence and carelessness in failing to exercise that degree of care, maintenance, prudence and foresight in the inspection, management and operation of its passenger equipment that the law requires and that the train upon which the plaintiff Phyllis Stanger was riding was derailed as a consequence thereof, for the reasons that:

a. The evidence establishes without dispute that the railroad roadbed and the track laid thereon was good and substantial, properly maintained, not de-

fective in any manner, and neither the roadbed nor track contributed in any manner to the derailment of the train.

b. The evidence establishes without dispute that the sole cause of the derailment was a broken wheel on the rear of the fourth car behind the engine of the train which caused the four rear cars or the four cars behind the one on which the wheel broke to be de- [36] railed; that said wheel broke from internal stresses existing in the plate of the wheel, which stresses or defects were latent and could not have been discovered by any kind of inspection prior to the time the wheel broke and that the breaking of said wheel could not have been guarded or protected against by human foresight or skill or the latent defect discovered by any known test prior to the time said wheel broke at Houston, Colorado, January 14, 1940.

c. That the evidence is insufficient to establish that the derailment alleged in the complaint was the cause of the continued excessive flowing of Mrs. Stanger which the operation was performed to cure and did cure. That it appears from the opinion of the court herein rendered December 6, 1941 and from the findings of fact and conclusions of law subsequently made by the court that the court has awarded damages to Phyllis Stanger and to her husband for all of the ailments, and consequences thereof, from which the said Phyllis Stanger was suffering at the time of the operation performed on her on July 19, 1940, which embraced a condition

of excessive flowing which had existed at least from the time of the birth of child in March, 1939, which said excessive flowing was caused by chronic cervicitis and fibrosis uterus, which said condition according to the undisputed testimony could not be caused and was not caused by any external violence or from any cause arising out of the derailment of the train upon which the said Phyllis Stanger was riding at the time alleged in her complaint, but which was a condition which arose following child birth; that said condition originated prior to the time of the derailment alleged in the complaint and was chronic and had not been cured and that the operation which was performed upon said Phyllis Stanger, consisting of removal of the uterus, one of the ovaries and part of the cervix, was performed for the purpose of and necessary to cure said chronic condition which existed prior to the time of said derailment, and that the subsequent inability of said Phyllis Stanger to bear children was caused by the act of her physician or surgeon in operating upon [37] her to cure a condition of fibrosis uterus and chronic cervicitis existing before said derailment and that said operation was not caused by any injury sustained by the said Phyllis Stanger in the derailment alleged in said plaintiff's complaint, but the court in arriving at an award of \$19,000.00, for which judgment has been entered, assessed heavy damages against the defendant for the aforesaid ailments, infirmities and chronic condition and the consequences of the operation necessitated thereby,

indistinguishably embracing such award with such injuries for damages, if any, as said Phyllis Stanger sustained in the derailment or would have sustained if she had exercised reasonable care for the protection of her health and diminution of damages following said derailment, which said injuries, both nervous and physical, would have been but slight and of temporary duration if the said Phyllis Stanger had so conducted herself. That the defendant is not liable or answerable in damages for any consequences resulting from impairment of the said plaintiff Phyllis Stanger's health or physical disorders from which she was suffering prior to the time of said derailment or of any operation which was necessary for the purpose of curing or correcting such disorders or impairment of health, but that the court by its decisions and findings and judgment has awarded and assessed damages against the defendant therefor. That because of this error committed by the court the evidence is insufficient to justify the foregoing decision and it is against law.

II.

Excessive damages appearing to have been given under the influence of passion and prejudice for the reasons set forth under the heading of "insufficiency of the evidence" more fully stated in paragraph numbered I preceding, and in this, to-wit:

That the court by its decision and findings and judgment has awarded to said Phyllis Stanger dam-

ages on account of a chronic condition of permanent excessive flowing which existed [38] prior to and independent of the derailment which occurred at Houston, Colorado, January 14, 1940, and for the permanent cure of which an operation was necessary and was performed and which caused said Phyllis Stanger to be sterile, for all of which the defendant has been charged in said judgment.

III.

Errors in law occurring at the trial as follows:

a. The court erred in denying the defendant's motion for judgment, and in rendering judgment in favor of the plaintiffs Phyllis Stanger and Albert G. Stanger against the defendant.

b. The court erred in holding and finding that upon the evidence in the case, the derailment, and the injuries of Phyllis Stanger, were due to the negligence of the defendant.

c. The court erred in holding and finding that Phyllis Stanger was thrown violently against a card table, and in holding and finding that the lower portion of her abdomen struck against said table, and in holding and finding that she was thereby severely and permanently injured internally.

d. The court erred in holding and finding that said Phyllis Stanger was in "reasonably good health prior to the accident".

e. The court erred in holding and finding that the operation which was performed by Dr. Hatch

on Phyllis Stanger in July, 1940, was because of the injuries received by her in the derailment, or that said operation was caused thereby.

f. The court erred in holding and finding that excessive flowing caused by the derailment and the removal of the uterus of Phyllis Stanger made Phyllis Stanger sterile, and in holding and finding that "the nervous shock and all of the personal injuries suffered and received by the said plaintiff Phyllis Stanger in said accident were due to and proximately caused by the negligence and carelessness of the defendant, its agents, servants and employees."

g. The court erred in holding and finding that said Phyllis [39] Stanger sustained permanent injuries as a result of the derailment, or that she will continue to suffer nervously and/or physically in consequence thereof as long as she may live.

h. The court erred in failing, in rendering judgment, to take into account that Phyllis Stanger had an established or chronic condition or disorder of her uterus and other related organs which was the basic cause of her operation, and which it was necessary to operate upon to cure, and that the defendant could not be charged therewith, but, at most, was chargeable only with such aggravation, if any, as would have resulted if following the derailment she had exercised the degree of care that she was bound in law to do.

i. The court erred in making an award and rendering judgment for an amount which included

compensation *fo* the plaintiffs for a chronically impaired physical condition of the said Phyllis Stanger existing prior to the time of the derailment and the operation performed to correct or cure said pre-existing disorder and the consequences resulting therefrom.

Said petition and motion are based and will be made upon all of the records, files, pleadings and proceedings in said action, including the opinion, findings of fact, conclusions of law and judgment, and upon the minutes of the court as stated and defined in Rule 50 of the Rules of Practice of this court, which embraces the Reporter's transcript of his notes in said cause.

GEO. H. SMITH,
H. B. THOMPSON,
L. H. ANDERSON,

Attorneys for Defendant.

Service and receipt of copy of the foregoing petition and motion for new trial is hereby admitted this 30th day of December, 1941.

JOHN FEREBAUER,
CLYDE BOWEN,
W. H. WITTY,

Attorneys for Plaintiff.

[Endorsed]: Filed December 31, 1941. [40]

[Title of District Court and Cause.]

ORDER

In harmony with the memorandum opinion filed in this cause on this date, it is Ordered that the motion of the defendant for a new trial be and the same hereby is denied.

Exception allowed.

Dated January 23, 1942.

CHARLES C. CAVANAH
United States District Judge

[Endorsed]: Filed January 23, 1942. [41]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the Union Pacific Railroad Company, a corporation, the above named defendant, does hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from that certain final judgment, and the whole thereof, made and entered in the above entitled court and cause on the 24th day of December, 1941, which said judgment was in favor of the plaintiffs herein and against the defendant.

Dated, this 31st day of January, 1942.

GEO. H. SMITH,

Attorney for Defendant, Re-
siding at: Salt Lake City,
Utah.

H. B. THOMPSON,

L. H. ANDERSON,

Attorneys for Defendant, Re-
siding at: Pocatello, Idaho.

[Endorsed]: Filed January 31, 1942. [42]

[Title of District Court and Cause.]

PETITION FOR APPROVAL OF SUPER-
SEDEAS AND STAY ON APPEAL.

Comes now the Union Pacific Railroad Company, a corporation, the above named defendant and appellant, and represents as follows:

That judgment was entered in the above entitled court and cause on the 24th day of December, 1941, in favor of Albert G. Stanger and Phyllis Stanger, plaintiffs, and against the Union Pacific Railroad Company, a corporation, defendant, for the sum of Nineteen Thousand (\$19,000.00) Dollars, and costs of suit taxed at Twenty-Three and 45/100 (\$23.45)Dollars; that said defendant has appealed from said judgment to the United States Circuit Court of Appeals for the Ninth Circuit, and desires the court to fix the amount of a Supersedeas Bond, approve the form thereof, and also approve

the Continental Casualty Company, a corporation, as surety, and thereupon order a stay of proceedings according to law.

Now, Therefore, Petitioner prays that the court fix the amount of said supersedeas bond, approve the bond tendered herewith, and the surety thereon, and order a stay according to law.

Dated, this 31st day of January, 1942.

GEO. H. SMITH,

Attorney for Defendant, Re-
siding at Salt Lake City,
Utah.

H. B. THOMPSON,

L. H. ANDERSON,

Attorneys for Defendant, Re-
siding at Pocatello, Idaho.

[Endorsed]: Filed January 31, 1942. [43]

[Title of District Court and Cause.]

ORDER APPROVING BOND AND GRANTING
A STAY OF EXECUTION

The defendant, Union Pacific Railroad Company, a corporation, having this day filed its Notice of Appeal from the judgment rendered in the above entitled cause in favor of the plaintiffs Albert G. Stanger and Phyllis Stanger and against the defendant Union Pacific Railroad Company, a corporation, to the United States Circuit Court of

Appeals for the Ninth Circuit, and having filed its petition for an order fixing the amount of a supersedeas bond and approving the bond tendered by said appellant and the surety executing the same, and granting said stay of proceedings.

Now, Therefore, It Is Hereby Ordered, that the amount of said supersedeas bond be fixed in the sum of Twenty Thousand (\$20,000.00) Dollars, and the bond tendered by the said Union Pacific Railroad Company, a corporation, in said sum with the Continental Casualty Company, a corporation, as surety, be and the same is hereby in all respects approved and that all proceedings herein for the collection of said judgment be and they are hereby stayed according to law.

Dated, this 31st day of January, 1942.

CHARLES C. CAVANAH

District Judge

[Endorsed]: Filed January 31, 1942. [44]

[Title of District Court and Cause.]

SUPERSEDEAS BOND

Know All Men By These Presents, That we, the Union Pacific Railroad Company, a corporation, as principal, and Continental Casualty Company, a corporation organized under the laws of the State of Indiana and authorized to transact the business of acting as sole surety upon bonds and undertak-

ings in the State of Idaho, as surety, are held and firmly bound unto Albert G. Stanger and Phyllis Stanger in the full and just sum of Twenty Thousand Dollars (\$20,000.00), lawful money of the United States of America, to be paid to the said Albert G. Stanger and Phyllis Stanger, their heirs, executors, administrators or assigns, to which payment well and truly to be made we bind ourselves, our and each of our successors or assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 31st day of January, 1942.

Whereas, lately in the District Court of the United States for the District of Idaho, Eastern Division, in a suit pending in said court between Albert G. Stanger and Phyllis Stanger, as plaintiffs, and the Union Pacific Railroad Company, a corporation, as defendant, a judgment was rendered in favor of the plaintiffs and against said defendant in the sum of Nineteen Thousand (\$19,000.00) Dollars, and bearing interest at the rate of 6% per annum from the date hereof, to-wit: on the 24th day of December, 1941, with [45] costs amounting to the sum of \$23.45, and said Union Pacific Railroad Company, a corporation, having filed in said court a Notice of Appeal to reverse said judgment in the aforesaid suit on appeal to the United States Circuit Court of Appeals for the Ninth Circuit, at a session of said Circuit Court of Appeals to be held at San Francisco, in the State of California.

Now, the condition of the above obligation is such, that if the said Union Pacific Railroad Company, a corporation, shall prosecute said appeal to effect, and satisfy the said judgment in full, together with costs, interest and damages for delay if for any reason the appeal is dismissed or the judgment is affirmed, and shall satisfy in full such modification of the judgment and such costs, interest and damages as the appellate court may adjudge and award against it, then the above obligation to be void; otherwise to remain in full force and virtue.

UNION PACIFIC RAILROAD

COMPANY, a corporation,

By L. H. ANDERSON,

One of its Attorneys of Record,
Residing at Pocatello,
Idaho,

Principal.

[Seal]

CONTINENTAL CASUALTY

COMPANY, a corporation,

By A. B. CHASE,

Its Attorney-in-Fact,

Surety.

A. B. CHASE,

Resident Agent.

The foregoing Bond is approved as to sufficiency, form and surety, and is allowed as a Supersedeas this 31st day of January, 1942.

CHARLES C. CAVANAH

District Judge [46]

Continental Casualty Company
Chicago

CERTIFICATE OF AUTHORITY
INDIVIDUAL ATTORNEY-IN-FACT

Know All Men By These Presents, That The Continental Casualty Company, a corporation duly organized under the laws of the State of Indiana, and having its general office in the City of Chicago, and State of Illinois, hath made, constituted and appointed, and does by these presents make, constitute and appoint A. B. Chase of Pocatello, Idaho, its true and lawful Attorney-in-Fact with full power and authority hereby conferred to sign, seal and execute in its behalf bonds, undertakings and other obligatory instruments of similar nature as follows:

Any and all Fidelity and Surety bonds in penalty not exceeding Five Hundred Thousand Dollars (\$500,000.00) behalf Union Pacific Railroad Company or its subsidiary or affiliated companies.

and to bind The Continental Casualty Company thereby as fully and to the same extent as if such instruments were signed by the duly authorized officers of The Continental Casualty Company and all the acts of said Attorney, pursuant to the authority hereby given are hereby ratified and confirmed.

This Power of Attorney is made and executed pursuant to and by authority of the following By-Law adopted by the Board of Directors of the

Company at a meeting duly called and held on the 6th day of January, 1937.

“Article XI—Surety Bonds and
Undertakings.

Section 2. Appointment of Attorney-in-Fact. The President or any Vice President may, from time to time, appoint by written certificates Attorneys-in-Fact to act in behalf of the Company in the execution of policies of insurance, bonds, undertakings and other obligatory instruments of like nature. Such Attorneys-in-Fact, subject to the limitations set forth in their respective certificates of authority shall have full power to bind the Company by their signature and execution of any such instrument and to attach the seal of the Company thereto. The President or any Vice President or the Board of Directors may at any time revoke all power and authority previously given to any Attorney-in-Fact.”

In Witness Whereof, The Continental Casualty Company has caused these presents to be signed by its Vice President and its corporate seal to be hereto affixed this 17th day of July, 1941.

CONTINENTAL CASUALTY
COMPANY

By ROY TUCHBREITER

[Seal]

Vice President

State of Illinois,
County of Cook—ss.

On this 17th day of July, 1941, before me personally came Roy Tuchbreiter, to me known, who being by me duly sworn, did depose and say: that he resides in the City of Chicago, State of Illinois; that he is a Vice President of the Continental Casualty Company, the corporation described herein and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to the foregoing instrument is such corporate seal; that it was so affixed pursuant to authority given by the Board of Directors of said corporation and that he signed his name thereto pursuant to like authority, and acknowledges same to be the act and deed of said [47] corporation.

[Notarial Seal]

H. McCRILLUS,
Notary Public.

My Commission expires April 9, 1944.

CERTIFICATE

I, A. B. Hvale Assistant Secretary of the Continental Casualty Company, do hereby certify that the attached Power of Attorney dated July 17, 1941 in behalf of A. B. Chase is a true and correct copy and that same is still in force.

In testimony whereof I have hereunto subscribed my name and affixed the corporate seal of the said Company this 31st day of January, 1942.

[Seal]

A. B. HVALE,
Assistant Secretary.

[Endorsed]: January 31, 1942. [48]

[Title of District Court and Cause.]

COST BOND ON APPEAL.

Know All Men by These Presents:

That we, the Union Pacific Railroad Company, a corporation, as principal, and Continental Casualty Company, a corporation organized under the laws of the State of Indiana and authorized to transact the business of acting as sole surety upon bonds and undertakings in the State of Idaho, as surety, are held and firmly bound to Albert G. Stanger and Phyllis Stanger, the plaintiffs and appellees in the above entitled cause, in the full and just sum of Two Hundred Fifty (\$250.00) Dollars, to which payment well and truly to be made we bind ourselves and our and each of our successors or assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 31st day of January, 1942.

Whereas, on the 24th day of December, 1941, in the District Court of the United States for the District of Idaho, Eastern Division, in a suit pending in that court, wherein Albert G. Stanger and Phyllis Stanger were plaintiffs, and the Union Pacific Railroad Company, a corporation, was defendant, a judgment was rendered against said defendant in the sum of Nineteen Thousand (\$19,000.00) Dollars, with interest and costs, and said defendant [49] having filed in the office of the Clerk of said District Court a Notice of Appeal to the United

States Circuit Court of Appeals for the Ninth Circuit.

Now, the condition of this obligation is such, that if said Union Pacific Railroad Company, a corporation, the appellant, shall prosecute said appeal and pay all costs if the appeal is dismissed or the judgment affirmed, or such costs as the appellate court may award if the judgment be modified, then the above obligation is void, otherwise to remain in full force and effect.

UNION PACIFIC RAILROAD
COMPANY, a corporation,

By L. H. ANDERSON,

One of its Attorneys, of Record,
Residing at Pocatello,
Idaho.

Principal

(Seal)

CONTINENTAL CASUALTY
COMPANY, a corporation,

By A. B. CHASE,

Its Attorney-in-Fact
Surety.

A. B. CHASE,

Resident Agent. [50]

Continental Casualty Company,
Chicago

CERTIFICATE OF AUTHORITY
INDIVIDUAL ATTORNEY-IN-FACT

Know All Men by These Presents, That the Continental Casualty Company, a corporation duly organized under the laws of the State of Indiana, and having its general office in the City of Chicago, and State of Illinois, hath made, constituted and appointed, and does by these presents make, constitute and appoint A. B. Chase of Pocatello, Idaho its true and lawful Attorney-in-Fact with full power and authority hereby conferred to sign, seal and execute in its behalf bonds, undertakings and other obligatory instruments of similar nature as follows:

Any and all Fidelity and Surety bonds in penalty not exceeding Five Hundred Thousand Dollars (\$500,000.00) behalf Union Pacific Railroad Company or its subsidiary or affiliated companies, and to bind the Continental Casualty Company Thereby as fully and to the same extent as if such instruments were signed by the duly authorized officers of The Continental Casualty Company and all the acts of said Attorney, pursuant to the authority hereby given are hereby ratified and confirmed.

This Power of Attorney is made and executed pursuant to and by authority of the following By-Law adopted by the Board of Directors of the Company at a meeting duly called and held on the 6th day of January, 1937.

“Article XI—Surety Bonds and Undertakings.

Section 2. Appointment of Attorney-in-Fact. The President or any Vice President may, from time to time, appoint by written certificates Attorneys-in-Fact to act in behalf of the company in the execution of policies of insurance, bonds, undertakings and other obligatory instruments of like nature. Such Attorneys-in-Fact, subject to the limitations set forth in their respective certificates of authority shall have full power to bind the Company by their signature and execution of any such instrument and to attach the seal of the Company thereto. The President or any Vice-President or the Board of Directors may at any time revoke all power and authority previously given to any Attorney-in-Fact.”

In Witness Whereof, The Continental Casualty Company has caused these presents to be signed by its Vice President and its corporate seal to be hereto affixed this 17th day of July, 1941.

(Seal)

CONTINENTAL CASUALTY
COMPANY,

By ROY TUCHBREITER,
Vice President

State of Illinois,
County of Cook—ss.

On this 17th day of July, 1941, before me personally came Roy Tuchbreiter, to me known, who

being by me duly sworn, did depose and say: that he resides in the City of Chicago, State of Illinois; that he is a Vice President of the Continental Casualty Company, the corporation described herein and which executed the above instrument that he knows the seal of said corporation; that the seal affixed to the foregoing instrument is such corporate seal; that it was so affixed pursuant to authority given by the Board of Directors of said corporation and that he signed his name thereto pursuant to like authority, and acknowledges same to be the act and deed of said corporation.

(Notarial Seal)

H. McCRILLUS,

Notary Public.

My Commission expires April 9, 1944. [51]

CERTIFICATE

I, A. B. Hvale Assistant Secretary of the Continental Casualty Company, do hereby certify that the attached Power of Attorney dated July 17, 1941 in behalf of A. B. Chase is a true and correct copy and that same is still in force.

In testimony whereof I have hereunto subscribed my name and affixed the corporate seal of the said Company this 31st day of January, 1942.

(Seal)

A. B. HVALE,

Assistant Secretary.

[Endorsed]: Filed January 31, 1942. [52]

[Title of District Court and Cause.]

STATEMENT OF POINTS.

Comes now the defendant-appellant, Union Pacific Railroad Company, and makes the following statement of the points upon which it intends to rely in the appeal taken to the United States Circuit Court of Appeals of the Ninth Circuit in the above entitled cause:

I.

That the evidence is insufficient to support a finding that the defendant was guilty of any negligence as charged in the complaint, for which reason the court erred in making and entering its findings of fact and conclusions of law and judgment in favor of the plaintiffs.

II.

That the evidence is insufficient to support a finding that the plaintiff Phyllis Stanger was injured and that she suffered damages in the amount of \$19,000.00, or in any such amount, or at all.

III.

That the damages awarded to the plaintiffs for the alleged injuries sustained by the plaintiff Phyllis Stanger are excessive and appear to have been given under the influence of passion and prejudice. [53]

That the reasons for the foregoing statement of points are more fully set forth in defendant's petition and motion for new trial.

IV.

That the court erred in denying defendant's objections to findings of fact, motion to strike and amend findings and motion to amend conclusions of law, as set forth in said objections, and erred in overruling defendant's motion to make and enter judgment in favor of the defendant.

V.

The court erred in denying defendant's petition and motion for new trial for the reasons set forth in said petition and motion.

Dated, this 3rd day of February, 1942.

GEO. H. SMITH,

Attorney for Defendant-
Appellant,

Residing at: Salt Lake City,
Utah.

H. B. THOMPSON,

L. H. ANDERSON,

Attorneys for Defendant-
Appellant,

Residing at Pocatello, Idaho.

Service of the foregoing Statement of Points by receipt of a copy thereof is hereby admitted this 3rd day of February, 1942.

JOHN FEREBAUER

CLYDE BOWEN,

Attorneys for Plaintiffs-
Appellees.

[Endorsed]: Filed February 4, 1942. [54]

[Title of District Court and Cause.]

TRANSCRIPT

Filed January 31, 1942

This matter was tried before the Court sitting without a Jury at Pocatello, Idaho, October 20, 1941. The Honorable Charles C. Cavanah, presiding.

Appearances.

John Ferebauer,

Idaho Falls, Idaho,

Clyde Bowen,

Pocatello, Idaho

W. H. Witty,

Pocatello, Idaho

Attorneys for the Plaintiffs.

George H. Smith,

Salt Lake City, Utah

H. B. Thompson,

Pocatello, Idaho

L. H. Anderson,

Pocatello, Idaho

Attorneys for the defendant.

G. C. VAUGHAN,

Reporter. [55]

October 20, 1941

Mr. Bowen: I want to move for the association of Mr. Witty as attorney for the plaintiff.

The Court: It is so ordered.

Mr. Thompson: and I have a stipulation and order for the consolidation of the two cases for the purpose of trial.

The Court: Very well.

(Whereupon the two cases were consolidated and tried under the foregoing title, as case 1149)

Mr. Bowen: The plaintiff desires that witnesses be put under the rule and excluded from the Court room.

The Court: Very well, the witnesses will remain out of the Court room.

Mr. Thompson: Does that imply that Mrs. Stanger may remain in the room while Mr. Stanger is putting on his case.

Mr. Witty: I think now that this is only one case, we have consolidated them and are now proceeding as one case.

Mr. Thompson: The cases are not merged. If there was a jury there would be two verdicts.

The Court: That is correct, I think counsel for the defendant is correct on that where you have two cases. [58]

Mr. Bowen: We consent to put Mr. Stanger's case on first, and that she leave the room.

The Court: You understand that the rule does not exclude the general manager or the representative who investigated the case for your company, or the one who has control of the case. I have always interpreted that rule in that manner, you are en-

titled to have your representative who has had charge of the case in the field.

(Opening statement by Mr. Bowen)

ALBERT G. STANGER

Being called at a witness on behalf of the plaintiffs, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Bowen.

Q. State your name to the Court and Counsel:

A. Albert G. Stanger, and my residence is Idaho Falls.

Q. How old are you? A. Forty-one.

Q. What is your business or occupation?

A. Manager of the Idaho Falls Warehouse Company. We handle and ship produce, ship and sell coal, fertilizer, insulating material, heating equipment and other articles pertaining to the general warehouse business.

Q. Is your place of business at Idaho Falls? [59]

A. At Idaho Falls, yes sir.

Q. Prior to January 13, 1940, and on that day what did your duties consist of?

A. Managing and directing the affairs of the Company. In that connection I buy and sell produce which we ship over the Union Pacific Railroad, buy coal from the Utah mines which we ship over the Union Pacific, buy fertilizer which we ship in over the Union Pacific for distribution from Ashton to Pocatello. We ship that in from Anaconda.

(Testimony of Albert G. Stanger.)

Q. Mr. Thompson: We object to all this as being entirely irrelevant.

Mr. Bowen: It will later have something to do with his earning capacity, and the loss of that earning capacity.

The Court: Objection sustained, you may proceed.

Q. Directing your attention to January 13, 1940, what if anything did you do on that day?

A. January 13, I purchased tickets for myself and Mrs. Stanger to Houston, Texas, for the purpose of attending a convention of producers and shippers, whereby I contact those I ship to throughout the season.

Q. You purchased tickets at Idaho Falls, Idaho, and your destination was where?

A. Houston, Texas. [60]

Q. Did you pay full fare for those tickets?

A. We paid full fare.

Q. Mr. Thompson: That is admitted.

Q. Do you recall what time you left Idaho Falls? A. I think we left Idaho Falls——

Mr. Thompson: I object to all this testimony down to the point of derailment.

The Court: Does your answer admit all this?

Mr. Thompson: I think it does.

The Court: You may proceed, I assume this is preliminary.

Mr. Bowen: Yes, it is.

(Testimony of Albert G. Stanger.)

Q. Just describe briefly the route the train took.

A. We left Idaho Falls in the afternoon. We came to Pocatello and changed trains, taking the train for Denver. We understood that we would arrive there the next morning, I think around eight o'clock. However, whether it was because of the weather or something else, the train was some two hours late that morning from the information we were given——

Mr. Thompson: Now this develops to be hearsay.

Q. When you say the information you were given,—strike that—directing your attention to the morning of January the 14, 1940, do you know whether immediately before the wreck the train was on time,—do you know whether the train was on schedule immediately before the wreck occurred?

[61]

Mr. Thompson: Objected to as irrelevant and not in issue in this case.

Q. According to the time-table?

Mr. Thompson: Now, we object to this as irrelevant and not in issue.

The Court: Overruled.

A. The train was approximately two hours late.

Mr. Thompson: Objected to unless counsel wishes to assume the burden by reason of charting this course, this is immaterial.

Mr. Bowen: It goes to the force and violence of this collision. The train was making up speed.

(Testimony of Albert G. Stanger.)

The Court: You may proceed. Just a minute Mr. Bowen, I think,—of course, if you know that the train was late and making up time,—I think I will sustain the objection at this time.

Q. Mr. Stanger, at Idaho Falls or other places were you furnished or did you obtain a Union Pacific time-table?

A. Yes, we had a time-table.

Q. Do you know what the time-table covered,—what railroad it covered?

A. It came from the Union Pacific for the train we were riding on.

Q. Did you consult or look at the time table to determine whether or not the train you were on, was on time, according to that schedule? [62]

Mr. Thompson: Objected to, it is leading and calls for an answer that would be hearsay. Any question on this which he might answer would be hearsay.

The Court: Overruled.

A. The time-table showed we were to arrive in Denver at a certain time, and they said we were two hours late. The Porter told us.

Mr. Thompson: We object to what the Porter said.

The Court: Sustained. You understand that I am not precluding you from showing that the train was late at that time. I think that is pertinent testimony.

(Testimony of Albert G. Stanger.)

Mr. Thompson: Now, upon my objection. I move that the testimony to the effect that the train was late be stricken.

The Court: It may be stricken for the present.

Q. Directing your attention to the morning of January 14 1940, before your train reached Denver did anything occur?

A. We were—as I stated heretofore—we were late due to the fact——

Mr. Thompson: Now we move to strike this again——

The Court: Yes, it may be stricken for the present.

A. —I better put it this way, the train wrecked.

Q. Do you know about how far out of Denver the train wrecked?

A. Approximately thirty miles. [63]

Q. Was that before arriving at Denver?

A. Yes sir.

Q. Do you know what time the wreck occurred?

A. About 9:30.

Q. Morning or night.

A. 9:30 in the morning, or in that neighborhood.

Q. Now, what were you doing. Where were you in the car at the time the wreck occurred?

A. We were playing cards. We had decided that we would until we got to Denver before having breakfast and it was decided to play a game of bridge to determine who would buy breakfast. Due

(Testimony of Albert G. Stanger.)

to the fact that we had this time on our hands we had settled down and were playing a hand of bridge.

Q. How were you seated in the car?

A. In the end of the car. My back was in the direction the train was traveling and opposite me was Mrs. Stanger and seated beside me was Mr. L. L. Hurst and opposite him was Dave Bush the Secretary of the Shippers Association.

Q. What were you playing cards on?

A. The porter had furnished us with a card table one that is inserted in the wall.

Q. What height was that?

A. The height of a table that fits that situation.

Q. Yes. Now this table was inserted in the wall. Describe that more fully. [64]

A. As I recall this table has protrusions that fits into slits in the wall that makes it rigid so that it can be used for that purpose.

Q. It was daylight when the accident occurred?

A. Yes sir.

Q. Had you had occasion to look out of the window shortly before the wreck occurred?

A. We commented upon it at that time due to the speed.

Q. Did you observe objects that you passed?

A. Yes sir.

Q. Do you drive an automobile Mr. Stanger?

A. Yes sir.

Q. How long have you driven an automobile?

(Testimony of Albert G. Stanger.)

A. Since about '13 or '14.

Q. Have you had occasion, during any of the time that you driven automobiles, to check the speed you are traveling at? A. Yes, I have.

Q. Now, directing your attention to the morning of January 14, 1940, did you make any observations of the objects you passed as to the speed you were traveling? A. I did.

Q. From your observation of the speed with which the car you were in passed these objects you observed, have you any recollection of the speed that the car was moving? A. Yes sir. [65]

Q. What is your best judgment of the speed that the car in which you were traveling was moving shortly or immediately before the wreck occurred.

A. Mr. Thompson: I object to this as not tending to support any averment of the complaint. I object to it also as being immaterial and irrelevant unless plaintiffs' counsel proposes to pursue establishing his case and assuming the burden which will follow his so doing.

Mr. Bowen: We submit that under paragraph five this is relevant.

Mr. Thompson: If he proposes to assume the burden we have no objection, with that understanding. What I am trying to make clear is that if he wishes to go into that evidence and assume the burden, as I say, I have no objection, but I do want to know the theory that we are proceeding upon.

(Testimony of Albert G. Stanger.)

The Court: I think under this allegation he may go into this. As to whether it comes under the allegation, this is a pretty general allegation that the defendant was negligent in having the management and control of the train, now whether the speed is competent here,—I think I will overrule the objection.

A. My best judgment from experience I have had would be that the car was moving in the neighborhood of sixty [66] or 65 miles an hour.

Q. Tell us what happened when the wreck occurred, or the derailment occurred?

A. It seemed to take place all of a sudden. The car swished and jolted from side to side,—that startled us and before we knew it the car simply dove headlong into the borrow pit.

Q. What happened to you?

A. It knocked us from side to side with the jolting we had. It tended to double me up. As it hit it dove me down kind of bent over with my head down and knees up, I had been thrown somewhat into the air.

Q. Was there any parts of the car broken?

A. I never had that experience before.

Mr. Thompson: Just answer the questions.

The Court: Yes, just answer the question.

A. Yes, parts of the car were noticeable. Screws were on the floor and sears thrown out of place. It was very dirty in there. Splinters were laying

(Testimony of Albert G. Stanger.)

around, and the glass in the window by which we were sitting was broken.

Q. Do you know whether any parts of the outside of the car were broken off?

A. As we managed to crawl out I noticed the steps and parts of the car down there curled up as if a great deal of pressure was exerted. [67]

Q. What stopped the car as it dove to the borrow pit?

A. It struck the borrow pit with the trucks of our car and the car in front of us was laying along side which tended to grab and stop our car.

Q. Was that stop abrupt or with violence?

A. Yes sir.

Mr. Thompson: You are leading.

Mr. Bowen: That's right, I will not do that.

Q. State whether the car was level or at an angle when it came to rest?

A. It rested at an angle in the borrow pit, and made it difficult to get out and in the car.

Q. At that time did you experience any pain or do you know whether Mrs. Stanger exhibited any evidence of pain?

A. We were all bruised up. Of course, the shock was something that we had never experienced before. One reason it became necessary for me to—I did try to get a ride immediately that was because Mrs. Stanger needed attention immediately.

Q. State what you did immediately after the wreck?

(Testimony of Albert G. Stanger.)

A. Collected ourselves as best we could and crawled out of the car, assisting Mrs. Stanger. She was more or less hysterical, and we gathered our luggage. We couldn't sit in the car or stand in it, it was at such an angle. We went outside the car.

[68]

Q. What was the condition of the weather?

A. It was in the morning and there was snow on the ground. It was wet snow, and with that condition,—with the weather condition being what it was——

Mr. Thompson: —He has answered the question we object to any comment.

Q. The weather was cold and the snow was wet.

Q. What did you do after you got out of the car?

A. I made inquiry as to whether or not any help was coming.

Q. Who did you make the inquiry of?

A. Railroad men.

Q. Who were they?

A. The Porter and I wouldn't be able to recall whether it was a brakeman or who the other man was that came alongside of the car.

Q. Did you find whether there was help coming or not?

Mr. Thompson: Objected to as it calls for a conclusion of the witness, and is based on hearsay. There is no proper foundation and it is not binding upon the defendant.

(Testimony of Albert G. Stanger.)

The Court: Sustained. I doubt that the porter could bind this company.

Q. What did you do after that?

A. Crossed the railroad in front of this car and I made my way out through the snow, through the borrow pit [69] across the fence to the highway where I stopped a car that was headed toward Denver.

Q. Did you go to Denver in that car?

A. All four of us, Mrs. Stanger and the other two men.

Q. I believe you stated that Mrs. Stanger had to have medical attention, do you know the reason?

A. Yes, shock and the jolting and bruising she received caused a conditoin to exist where she had to have medical attention, otherwise it would be very embarrassing, and it was under those conditions that she needed attention.

Q. What happened there?

A. The excitement and the condition there caused her to flow.

Q. What did you do and where did you go after you got to Denver?

A. To the Union Pacific Station.

Q. When did Mrs. Stanger start to flow with reference to the time the accident occurred and where were you?

A. At the wrecked car.

Q. What did you do after you got to the Union Pacific Depot in Denver?

(Testimony of Albert G. Stanger.)

A. We looked for friends that we were supposed to meet,—that were to meet us there, and we went in and it was thought best——

Mr. Thompson: Object to what he thought best.

The Court: Yes, we want the fact. [70]

A. We had a cup of coffee.

Q. You had a cup of coffee. A. Yes sir.

Q. Did you go any place?

A. Yes, we met these friends and they took us to their residence.

Q. In Denver? A. Yes sir.

Q. After you got there what did you do?

A. They called their Doctor to give us aid.

Q. Do you know who that Doctor is?

A. The Doctor,—the Railroad Doctor, the C & S Doctor, I cannot recall his name.

Q. Did he administer some aid to you and Mrs. Stanger? A. Yes sir.

Q. How long was it from the 14th of January 1940 until you returned to your home at Idaho?

A. You mean after we left Denver.

Q. How long after the 14th of June did you return home to Idaho Falls?

A. Approximately two weeks.

Q. What is the fact as to whether or not you suffered pain in any portion of your body during that period of two weeks?

Mr. Thompson: Counsel made a statement here, —how I wish in answer to this question that the witness [71] would answer yes or no. Counsel said

(Testimony of Albert G. Stanger.)

I believe, that Mr. Stanger received an injury to his hip, the only thing in issue is on page there where he alleges the injuries and I think they are alleged to be to the spine the back and the shoulder, and within these limits I have no objection. Since the witness is so willing and shows such a disposition to enter into long discussions I object to his testifying beyond that.

The Court: He may answer.

A. I suffered pain in the back at the time of the accident and I also had an injured hand.

Q. Describe the pain you experienced, where in your back was that pain.

A. The pain and injury to my back seemed to be a little above the middle of the back. It wasn't a severe pain but one of these aggravating pains which I could relieve by application of heat or something of that sort.

Q. During those two weeks did Mrs. Stanger complain?

A. She isn't the complaining kind but she had considerable pain and was——

Mr. Thompson: Objected to as it is not responsive but assumes that she did have pain.

The Court: If you do not object——

A. Due to the injuries it was necessary——

Mr. Thompson: Now, I object to this statement [72] as it is simply a conclusion of the witness.

The Court: Yes, that would be. He may state whether or not she complained of pain.

(Testimony of Albert G. Stanger.)

Q. State whether she complained of pain?

A. Yes, she did.

Q. Did she say what portion of her body she was experiencing pain in?

A. The abdominal region.

Q. Now, this condition of flowing do you know whether that continued from the time of the wreck?

A. Yes sir.

Q. What did you do after you got back to Idaho Falls, with reference to your injuries?

A. Mine.

Q. Yes, what did you do?

A. I immediately contacted Doctor Call, he treated me and I took exercises for several months.

Q. Who is Doctor Call?

A. He is a Doctor at Idaho Falls.

Q. Did you request him to come to this trial?

A. Yes sir.

Q. What was his reason for not being able to come?

A. Mrs. Call is not expected to live. She may pass away any minute, and for that reason he wanted to be excused.

Q. Have you gone to any—withdraw that—How many times did [73] you go to see Doctor Call for treatment?

A. I haven't a record of the number of calls, but for weeks I went twice and some weeks three times a week, and then it dwindled down to once.

(Testimony of Albert G. Stanger.)

Q. Can you tell us over what period of time you went to him? A. Up until May.

Q. Of what year? A. May of 1941.

Q. I don't think I asked you what day it was that Doctor Call told you that he couldn't come to this trial. A. Friday last.

Q. And he wanted to be excused?

A. Yes sir.

Q. Have you been to any other Doctors besides Doctor Call? A. Yes sir.

Q. Who are they?

A. I have gone to Doctor Miller for deep therapy treatments and also to Doctor Warner for attention.

Q. Did you make any trips out of town?

A. Yes, I have had treatments in Texas in July.

Q. Did you go to the Mayo Brothers?

A. Yes sir.

Q. When,—how long were you there?

A. Approximately five to seven days.

Q. Are you receiving treatments from anyone at this time? A. I am. [74]

Q. What kind of treatments?

A. Chiropractic treatments from Doctor Rogers and also deep therapy treatments from Doctor Miller at Idaho Falls.

Q. Describe the pain you have, whether it is constant?

A. It is not constant, it comes on and off. If I get plenty of rest it doesn't bother as much as

(Testimony of Albert G. Stanger.)

when I don't. If I don't give it attention it drives me from work. I have to get a treatment or go home and get a hot application in order to remove the trouble of the severe pain.

Q. Has that condition existed from the date of the accident up until now? A. It has.

Mr. Thompson: Objected to as leading and——

Mr. Bowen: I will withdraw it.

Q. State whether,—what the fact is as to whether or not the condition has existed from the date of the accident?

Mr. Thompson: Objected to on the same ground.

The Court: He may answer. Overruled.

Q. State what the fact is as to whether or not your back has caused you pain from the date of the accident up to now?

Mr. Thompson: Objected to as leading.

The Court: Overruled.

A. It has caused pain as described heretofore, but at times it isn't as severe as at other times. Sometimes it is so severe that I must quit work to get relief.

Q. Can you tell us how many times it has been necessary to [75] quit work to get some relief?

A. Some days I have had to leave the office as high as four times. At other days I have not left although it does cause me discomfort.

Q. Since when has that existed?

A. Since the accident.

(Testimony of Albert G. Stanger.)

Q. What is the fact as to whether that comes on oftener within the last six months than it did during the first six months after the accident?

A. It comes very frequently.

Q. Have you lost any time from work because of this pain? A. Yes, sir.

Q. What is the fact as to whether the pain you experienced is in the same region as you experienced immediately after the accident, that is, in the region of your back? A. It is.

Q. Directing your attention to the time before this accident what is the fact as to whether you suffered any pain in your back?

A. I did not.

Q. Were you able to perform your work without pain? A. I was.

Q. What was the condition of your health?

A. It was very good.

Q. Are you able to sleep and rest since this accident occurred,—to sleep and rest at night? [76]

A. Not like I did before the accident. I am not able to sleep regularly and get my usual sleep.

Q. Have you observed any difference in your physical condition? A. Yes.

Q. Since the accident? A. Yes.

Q. What is it?

A. I am not performing my work. I am not able to do the work I was able to do before the accident due to the fatigue and due to the fact that my back bothers me.

(Testimony of Albert G. Stanger.)

Q. You use the word fatigue just what do you mean by that?

A. When this pain hits me it weakens me to the point that I cannot carry on at work which I am required to do.

Q. Has it been necessary to employ help in your work?

Mr. Thompson: Objected to as irrelevant.

Mr. Bowen: I will reframe the question.

The Court: Very well, go ahead.

Q. Have you employed additional help since this accident?

Mr. Thompson: We object to this, this man's business, or the business he manages is not his own, it is a company.

Mr. Bowen: I will withdraw that question.

The Court: Very well.

Q. Tell the Court and counsel about your business, how it is operated.

A. The business is a corporation in the State of Idaho, the [77] stock of that company belongs to the immediate family.

Q. Do you have certain obligations that are your own individually? A. Yes, sir.

Q. Have you, individually, hired anyone to work there since this wreck? A. I have.

Q. How much do you pay them?

Mr. Thompson: Objected to as irrelevant and

(Testimony of Albert G. Stanger.)

immaterial, unless by what he testifies to he wishes to make it clear that it is his individual business.

The Court: It is a question of how this man is situated there.

Mr. Bowen: The question was as to whether he himself has hired someone to work there since this wreck.

The Court: This is a corporation and he says that the family owns the stock.

Q. What family do you mean?

A. What is that.

Q. When you say the family owns the stock of the corporation what family do you mean?

A. My own family. My father, brothers and myself.

The Court: The Company belongs to them?

A. Yes, sir.

The Court: Of course, we know that a corporation acts in a regular manner. [78]

Q. What are your personal duties and what were they immediately after this wreck, as an individual?

A. As an individual.

Q. In this corporation?

A. To run it as best I knew how. To make money. In that connection I am general manager.

Q. Just what did you do as such?

A. I took charge of the buying and selling of potatoes. Up until the first of the year I took charge of buying and selling feeds together with the su-

(Testimony of Albert G. Stanger.)

pervision of other parts of the business, the phosphate and the *hearing* departments.

The Court: Does that have anything to do with employing men.

Mr. Bowen: I will get at this shortly. His earnings.

Q. How are you paid?

A. Monthly salary and a percentage of the profits.

Q. What determines the percentage of the profits?

A. May I ask that that question be read again?

Mr. Bowen: I will reframe it.

Q. This percentage of the profits you speak of, what determines what that is?

Mr. Thompson: We object to that as irrelevant and immaterial and it does not tend to support any issue.

Mr. Bowen: In paragraph 10 we allege that [79] he lost certain earnings, and we are attempting to show how these commissions are earned.

Mr. Thompson: He hasn't said that the business suffered any injury.

Mr. Bowen: He individually hired this man to take his place.

Mr. Thompson: Was his salary suspended?

Mr. Bowen: No, but this commission, he didn't draw that.

Mr. Thompson: That is outside of the issues of this case.

(Testimony of Albert G. Stanger.)

The Court: I understand that he is limiting it to this witness individually employing others to do the work that he was to do as manager.

Mr. Bowen: We are limiting it strictly to that.

The Court: Overruled.

A. This man that I hired to take charge of the feed department is paid a hundred dollars a month with 25 per cent of the profits of that division of the business. The feed department.

Mr. Thompson: Now in view of the answer it seems to me that the objection was well taken and I move, for the reasons stated in the objection, I move that the answer be stricken.

The Court: Counsel has stated that this witness has employed someone since this accident. Let [80] me ask counsel for the plaintiff this: You assert that this witness as general manager of the business, since the accident has employed someone to perform his duty.

Mr. Bowen: Yes, your Honor.

The Court: Limited to that, I will overrule the objection.

Mr. Thompson: In order to make myself clear. I object on the ground that it is not proper to go into the profit or loss of the Company, nor who the Company hired because of some injury to Mr. Stanger.

The Court: But he is not going into that. Just who he hired individually, because of his injury.

(Testimony of Albert G. Stanger.)

Mr. Bowen: Limited strictly to what this man lost.

The Court: Overruled, limited to that.

Q. How much have you paid to this man up to the present time; if you know?

A. I think, Your Honor——

The Court: If you can't answer the question just say so.

Mr. Thompson: I renew my objection.

The Court: I will make this statement once more. The Court is permitting this to go in limited to what he paid out to have these duties performed.

A. Up to date \$800.00.

Q. Now, what is the fact as to whether you have employed [81] any help in the home since this wreck?

A. Help has been employed but Mrs. Stanger has done the employing.

Q. Are you able to inform us as to the amount that was paid for the help that was hired?

A. Does the cost take into consideration——

Mr. Thompson: I submit that no proper foundation is laid for this.

The Court: Sustained.

Q. Has Mrs. Stanger performed her household work since this wreck?

A. Not normally.

Q. Did she perform the work about the house prior to the wreck, Mr. Stanger?

A. She did.

(Testimony of Albert G. Stanger.)

Q. Do you know why she has not performed her work since the time of the wreck?

A. Because of ill health.

Q. Do you know whether or not she spends any time, and how much time she is confined to bed?

Mr. Thompson: That is objected to as it is leading and assumes matters not in evidence.

The Court: Overruled, he may answer.

A. It has been necessary for her to take much more rest than she did before the accident.

A. You do maintain a home at Idaho Falls?

[82]

A. I do.

Q. Have you employed help in that home since the wreck? A. Yes sir.

Q. Are you still employing help in that home?

A. Not on this particular day, but we do.

Q. Did you employ any help about the home to assist Mrs. Stanger in the housework before this accident? A. No sir.

Q. Do you know the amount that you yourself have paid for yourself, for Doctors Medicine and treatment? A. For myself?

Q. For yourself.

A. That was tabulated, but right now I have forgotten the figures.

Q. You can supply that later can you?

A. I can.

Q. Have you paid out anything for Mrs. Stanger's treatment? A. Yes sir.

(Testimony of Albert G. Stanger.)

Q. Do you know how much that is?

A. The doctor bill was approximately \$300.00 and the hospital bill approximately \$200.00 and besides that the special nurse, the blood transfusion and so forth.

Q. You have paid those bills?

A. Yes sir.

Q. Have you paid your own bills?

A. I have with the exception of some treatments within the [83] last week, or the last few weeks, however, there is a small balance due the Doctor.

The Court: We will recess for ten minutes.

Oct. 20, 1941, 11:25 A.M.

Mr. Bowen: Counsel has agreed that we may call Doctor Hatch out of order so that he may return to his practice at Idaho Falls.

The Court: Very well.

DOCTOR H. RAY HATCH

Being called as a witness on behalf of the plaintiffs, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Bowen:

Q. State your name? A. H. Ray Hatch.

Q. Where do you reside?

A. Idaho Falls, Idaho.

Q. What is your business or profession?

(Testimony of Dr. H. Ray Hatch.)

A. Practising physician and surgeon.

Q. Are you a regularly, duly licensed and practicing physician and surgeon? A. Yes sir.

Q. Licensed to practice medicine and surgery under the laws of Idaho? A. Yes sir. [84]

Q. Of what school are you a graduate?

A. Ruch Medical college.

Q. Tell us of any other work or training you have had equipping you for your profession?

A. The usual series of post graduate visits and courses.

Q. For how many years have you practiced medicine and surgery?

A. Since 1910, about thirty-one years.

Q. How long have you been practicing at Idaho Falls? A. Since 1920.

Q. Approximately 21 years? A. Yes sir.

Q. How many courses of Post graduate work have you had? A. I cannot say off hand.

Q. It has been a number has it?

A. Yes sir.

Q. Have you been acquainted with Phyllis Stanger? A. Yes.

Q. One of the plaintiffs here.

A. Yes sir.

Q. Have you treated her professionally?

A. Yes sir.

Q. When did you see her,—if you have seen her, after January 14, 1940?

A. I may refer to my notes, may I? [85]

(Testimony of Dr. H. Ray Hatch.)

Q. Yes, certainly.

A. My records show February 12, 1940.

Q. When she called on you, can you describe what your examination of her disclosed, if you made an examination?

A. How much detail shall I go into?

Q. Just generally Doctor, just what did she complain of?

A. She was a very nervous girl, on a rather high nervous and low emotional threshold. The emotional responses were out of proportion with the other condition, and the causes,—she complained of severe uterine bleeding. I have rather a detailed notation of this case.

Q. Well, Doctor, let me ask you, did you examine her body to see whether she had this unusual bleeding?

A. Yes sir.

Q. That condition existed?

A. Yes sir.

Q. What did you do for her?

A. Well, I prescribed emotional nervous sedatives, tonics and various recognized intravenous injections to build up the blood supply in attempting to meet such factors that caused this bleeding, in the endocrine glands, the thyroid and pituitary glands which are related and which at times in connection with the sympathetic nervous system are mixed up in these menstrual causes, this excess bleeding.

Q. Did she or did she not respond to this usual treatment? [86]

A. No sir, she didn't.

(Testimony of Dr. H. Ray Hatch.)

Q. What further did you do?

A. This bleeding continued to a rather alarming state and the blood equality or oxygen carrying properties of the blood were effected until her hemoglobin was 48 per cent. In order to meet this I operated on her after giving a blood transfusion on July 9, 1940. We removed this bleeding uterus.

Q. Would the removal of that portion of her anatomy make her sterile? A. Yes sir.

Q. Can you tell us the amount of your bill for the operation and for your entire treatment of her?

A. I cannot give you the accurate figures but it is in the neighborhood of \$350.00 or \$400.00.

Q. Would that be for your services?

A. Yes sir.

Q. Would that be a reasonable amount for the services that you performed?

A. Yes sir, under the circumstances.

Q. Do you recall how long you treated her from that time? A. From February to July.

Q. You operated in July?

A. The 9th of July.

Q. How long after that was she under your observation?

A. She appears now for a checkup occasionally, our records [87] show rather active and continual treatment until December 30, 1940, beginning February 12 and up to December 31, 1940.

Q. Did this excessive bleeding improve or get better?

(Testimony of Dr. H. Ray Hatch.)

A. Yes sir, she didn't bleed after the operation.

Mr. Bowen: That is all, you may examine.

Cross Examination

By Mr. Anderson:

Q. Doctor, was this the first time she was your patient, on February 12?

A. So far as I recall, I may have seen her at rare intervals but this is the first so far as my recollection is concerned for anything except casual matters.

Q. What does 48 per cent hemoglobin mean?

A. People of this latitude in what we call good health usually range from 85 to 105 or 110 per cent hemoglobin and 48 per cent is based upon that normal standard.

Q. What caused that,—her flowing?

A. Yes sir.

Q. You removed the ovary?

A. The uterus and the womb.

Q. Did you also remove an ovary?

A. Yes, the right ovary.

Q. What else did you do on that operation?

A. The chart shows conization of cervix, removal of the lining of the neck of the womb—

[88]

Q. But Doctor, you did remove the ovary?

A. Yes sir, the right ovary.

Q. Why did you remove the ovary?

A. Two reasons, one was there was some little cysts, and the principal reason was that in the re-

(Testimony of Dr. H. Ray Hatch.)

removal of the uterus to which the ovary is closely related, and the blood supply to the ovary was sufficiently interfered with owing to this fact, and that there were some small cysts it was considered that it would be better to remove it than to leave it with inadequate circulation.

Q. Doctor what is the function of the ovary?

A. Different functions, the pathological function being a reproduction organ that supplies the ova,—the female cell, the contribution to the new off-spring, it has the endocrine secretion,—its pathological function is reproduction and also this complex internal secretion.

Q. If an ovary is cystic that causes bleeding.

A. Not necessarily.

Q. Did it in this case?

A. I cannot say.

Q. The ovary was cystic.

A. Slightly cystic.

Q. It caused bleeding in this case, otherwise you would not remove it.

A. The removal in this case had nothing to do with the bleeding.

Q. Had nothing to do with it. [89]

A. No.

Q. Why did you remove it?

A. Partly because of the small cyst that was questionably diseased,—there is a difference of opinion,—and in the removal of the uterus the blood supply was interfered with and I questioned the

(Testimony of Dr. H. Ray Hatch.)

advisability of leaving the ovary. I think it would have been removed independent of this cyst because of what I considered the inadequate blood supply.

Q. Did you think,—strike that,—did that have any connection with the bleeding of the uterus which you operated? A. I think not.

Q. What was the condition of that uterus, was it fibrous? A. Yes, it was fibrous.

Q. What does that mean?

A. It means that there is an increase of connective tissue which constitutes the major portion of the walls of the uterus, also an increase of tensesness or hardness of fibrous tissue composing the wall of the uterus.

Q. That is usually caused by some infection at or following child-birth.

A. No sir, not usually. It is a process that comes on unavoidably with women as they approach the change of life. It is the beginning of nature's effort to do away [90] with the uterus.

Q. You operated and severed part of the uterus.

A. Removed practically all of the uterus.

Q. You did that to stop the bleeding.

A. To stop this excess bleeding.

Q. Now Doctor, you would say that it was the fibrous condition of the uterus which caused the flowing.

A. I didn't complete my answer to your last question as to the condition of the uterus.

(Testimony of Dr. H. Ray Hatch.)

Q. Can you answer my question I ask now?

A. I cannot answer it yes or no.

Q. When you operated,—before you operated on Mrs. Stanger you made a pre-operative diagnosis.

A. Yes sir.

Q. What was that?

A. Bleeding uterus, but that is not a very accurate diagnosis.

Q. You knew that you had to perform the operation, you were reasonably certain that she had a fibrous uterus?

A. I wasn't entirely certain as to the detailed condition, or the total condition that we would find in the uterus.

Q. What did you expect to find?

A. Well, the range of conditions are quite large which might cause bleeding in the uterus. As my examination disclosed the uterus was only fairly firm, like the uterus in some women it wasn't enlarged. There is also [91] quite a range of possible explanation for a uterus of that type, the indication for operation was the stoppage of this hemorrhage that failed to respond to the more conservative treatments that was more important, rather than concern about the particular abnormalities that might be found in the uterus.

Q. What was the pathological report after operation?

A. The pathological diagnosis, fibrosis uteri with diffuse endometrial hyperplasia—

(Testimony of Dr. H. Ray Hatch.)

Q. Just give us the pathological report.

A. Yes, and chronic fibrous cervicitis; multiple follicular cysts of the ovary with corpus hemorrhagicum.

Q. That was the conclusion.

A. That was the pathologist's report after a study of the tissue I removed.

Q. The uterus and the ovary and the cervix is low in the body, behind the pelvis.

A. Behind the pelvic bone, behind the pelvic and pubic bone.

Q. Doctor, describe fibrosis uteri with diffuse endometrial hyperplasia. What is that?

A. Thickening of the lining of the uterus.

Q. Was that a result of a fibrous uterus?

A. It is perhaps an independent condition.

Q. It is due to advance age of a woman?

A. It occurs more frequently in women of more advanced years but also occurs in young women.

[92]

Q. What is chronic fibrous cervicitis?

A. That is a result,—it is scarred tissue formation in the neck of the womb, that is very frequently due to chronic infection following child-birth and so forth.

Q. The same that would cause fibrous uterus?

A. Not exactly the same.

Q. You said infection and scar tissue following child-birth could cause fibrous uterus?

A. I didn't mean to say that.

(Testimony of Dr. H. Ray Hatch.)

Q. Didn't you say it could cause it?

A. I think it could if there was severe infection.

Q. Did you attend Mrs. Stanger at the birth of her last child? A. No sir.

Q. Do you know when it was born?

A. A baby about one year old on February 12, when she came to see me.

Q. You did have a history of her having this bleeding following this child-birth and prior to January 1940?

A. Following the birth of the child, yes.

Q. Did you treat her for that?

A. No sir.

Q. Was that before January 1940 she was suffering from this trouble of flowing?

A. Well, I am informed that she did have some flowing following the birth of her baby. [93]

Q. Successive or continual,—it was unusual, it wasn't the normal flow, was it Doctor?

A. I understand she was treated for it.

Q. And from then it came down to the thing for which you operated, the cause was continuous down to the time you operated.

A. No, sir, I understand there was a long period that she was free from excessive flow, either as to amount or duration for some time previous to my treating her.

Q. You don't know for what period or when?

A. No sir, I haven't any accurate date on that. I am sorry.

(Testimony of Dr. H. Ray Hatch.)

Q. You specified that she had fibrous uteri; chronic fibrous cervicitis and cystic ovary.

A. Prior to the operation?

Q. Yes.

A. No sir, I would like to qualify that statement.

Q. You operated to stop this bleeding?

A. Yes sir.

Q. It is your opinion that the operation was necessary to do that? A. Yes sir.

Q. Did you know,—did she tell you that she had been to other Doctors for similar treatment prior to coming to you?

A. She told me that she had been to other Doctors for treatment.

Q. For this same condition? [94]

A. Yes sir, that is, for bleeding that was prolonged after childbirth.

Q. That bleeding that was prolonged indicated fibrous uterus or cystic ovaries or chronic fibrous cervicitis?

A. Likely none of those. Bleeding that is prolonged after childbirth is what we call *sub-involution*.

Q. Doctor, what are the symptoms of chronic cervicitis and multiple follicular cysts of the ovary with corpus hemorrhicum?

A. They usually don't have symptoms.

Q. Mrs. Stanger had symptoms?

A. Yes, sir, she had symptoms.

Q. What were her symptoms?

(Testimony of Dr. H. Ray Hatch.)

A. Bleeding uterus, nervous, emotionally upset. The thing that concerned me was the bleeding uterus.

The Court: It appears that you will not finish this witness in a short time, so we will recess until 2 o'clock.

2 o'clock P. M. October 20, 1941.

Cross Examination
continued

By Mr. Anderson:

Q. Did you say that you had talked with other Doctors who might have treated Mrs. Stanger to get a history? A. No sir.

Q. Did she tell you the Doctors she had gone to before you treated her? [95]

A. I think that was brought out in my questioning of her.

Q. And who had she gone to?

A. I have a record of Doctor Wooley of Idaho Falls.

Q. He had treated her just prior to her leaving on this trip.

A. I don't have the data as to how long prior.

Q. It was prior to this trip? A. Yes sir.

Q. He had been treating her for the same thing you had treated her for afterward.

A. I cannot testify to that. It was subsequent to the birth of her child. My information is quite limited as to what it was for, except it was between

(Testimony of Dr. H. Ray Hatch.)

the time of the birth of her child and the time she came to me.

Q. You understood that it was for the same thing.

A. You say, I understood.

Q. You understood that it was for the same thing.

A. Well, she said it was for her prolonged flow and it had been helped by shots.

Q. She had been treated for this condition before she went on her trip and before you saw her.

A. I cannot say that by answering yes or no.

Q. You treated her for excessive flowing.

A. And continued flowing.

Q. And so did Doctor Wooley.

A. I don't know as to the detail of that. [96]

Q. Any other Doctors that you recall?

A. I don't recall.

Q. Did she mention Doctor Miller?

A. I know he was the family physician but I don't know that his name came up at that time.

Q. Doctor Miller took care of her at the birth of her last child? A. I understood so.

Q. On the pathological statement, the last part says, after chronic fibrous cervicitis,—multiple follicular cysts of the ovary with corpus hemorrhagicum. What is a follicular cyst?

A. When the ovum breaks through the wall it leaves a temporary wound on the surface of the ovary and at times that seals over before the follicle,—it prematurely seals, as a result there is a slight

(Testimony of Dr. H. Ray Hatch.)

distension of that cavity that had become prematurely sealed over.

Q. Doctor, my question was what do you mean by follicular.

A. The female sex cell is called a follicle. As the ovum develops that follicle enlarges so that when the ovum breaks through or ruptures through the wall,—the cavity or structure which contains the ovum is called the follicle.

Q. The sealing of the cavity you spoke of caused these follicular cysts. Multiple means many.

A. More than one. [97]

Q. These multiple follicular cysts, was it an unusual condition?

A. Not unusual where they occur.

Q. But it is an unusual condition. Isn't it something contrary to nature?

A. I can give my opinion that there is not much of the abnormal in nature.

Q. Can you answer the question?

A. I cannot answer that yes or no.

Q. Why?

A. Because there is a divergence of opinion, and that is not an accurate statement.

Q. Some say it is an abnormal situation.

A. And others say that it is and that it is not of much significance.

Q. Would you say that some authorities say it is something that is against nature, or something that goes with nature?

(Testimony of Dr. H. Ray Hatch.)

A. That is a hard question to answer, whether it is against nature or going against nature.

Q. Let me ask this, is it consistent with the natural process of women?

A. You mean these cysts?

Q. Multiple follicular cysts.

A. May I elaborate on that answer?

Q. Tell me this,—answer my question. [98]

The Court: You may answer the question and explain your answer.

Q. Doctor, it is the exception rather than the rule to find a condition such as this existing?

A. The exception to what rule.

Q. In an ovary that is normal in a well person.

A. I can say that it is not exceptional,—that is, is not an exceptional experience, because we find it frequently in operations upon women for other conditions.

Q. For which reason you deem it advisable to remove the ovary?

A. No sir.

Q. But you did in this case?

A. Only partially the reason.

Q. Did you ever find this same condition existing in a well woman?

A. I haven't operated knowingly on any well women.

Q. Then you don't know that it exists in well women?

A. In a woman who might be well so far as the ovaries are concerned.

Q. What does this mean in the pathological re-

(Testimony of Dr. H. Ray Hatch.)

port after it says "multiple follicular cysts of the ovary" then it says "with corpus hemorrhagicum"?

A. That is one of these follicles that has just recently discharged its ovum, and the cavity is filled with a clot of blood. [99]

Q. That is not the result of normal flowing?

A. Normal ovulation.

Q. Didn't that create a bleeding condition?

A. Of the uterus.

Q. Of the ovary.

A. That is insignificant, the bleeding that happens when the ovum is discharged.

Q. If it is multiple is it still insignificant?

A. It isn't often that we find that condition.

Q. Didn't you diagnose this as multiple cysts with corpus hemorrhagicum?

A. No, not hemorrhagicum. Not hemorrhagicum cysts.

Q. Did you take any other history, other than you told me? Did you search the hospital record, or did she tell you anything that might have had a bearing on your treatment, prior to leaving on this trip?

A. Yes sir.

Q. What was that?

A. These matters of history,—we take a careful history.

Q. What was that history?

A. A tonsil operation, appendix operation, three children, baby one year old, and matters of general interest.

(Testimony of Dr. H. Ray Hatch.)

Q. Did she mention toxemia pregnancy in 1938 or 1939? A. I haven't it recorded.

Q. And threatened abortion?

A. I haven't that recorded. [100]

Q. Did she tell you about those?

A. No sir, I don't recall that she did.

Q. You didn't check the record of the hospital.

A. No sir, and I think the appendix was elsewhere.

Q. This operation was at the L D S hospital at Idaho Falls, didn't you think that it was important to check the record to see what other operations she might have had? A. No sir, I didn't.

Q. What is toxemia pregnancy caused from, can you tell us Doctor? A. No sir.

Q. Well, what is it?

A. It is a very broad term which includes any untoward complication of the body,—chemistry associated with the state of pregnancy.

Q. And caused from excessive flowing from the ovaries?

A. I never heard of that as one of its causes.

Q. What causes threatened abortion?

A. The causes are legion.

Q. Excessive flowing is one of the symptoms?

A. That is a part rather than a symptom.

Q. Just before you operated in July 1940 you had a preoperative diagnosis of fibrous or fibrosis uteri and chronic cervicitis is that correct?

(Testimony of Dr. H. Ray Hatch.)

A. The record will show that was my tentative opinion.

Q. Isn't it a fact that your history taken just before [101] you operated, was that to the effect that she commenced to menstruate at fourteen and was regular until delivery of her child in 1939 and since that time she had been flowing instead of four days, always three weeks? Do you recall that is correct?

A. I don't recall taking such a history.

Q. I will show you what is purported to be a case history. I show you now what is marked as plaintiff's exhibit,—defendant's exhibit "1" that is the hospital record of Mrs. A. G. Stanger, and the record of the operation which you performed in July 1940?

A. It is, yes.

Q. Is it also the pathological report,—does it also contain the pathological report in addition to your pre-operative diagnosis and the history you took?

A. I must apologize because I cannot read the wording of this diagnosis.

Q. You wrote it did you not? A. No sir.

Q. You wrote the history?

A. I didn't write this history.

Q. That is the history you gave to someone, or was given to you?

A. It was a history written perhaps subsequent to the operation by our house Doctor from the

(Testimony of Dr. H. Ray Hatch.)

writing I would say Doctor Fred Price, now this final diagnosis [102] is my handwriting.

Q. And what is that?

A. Fibrosis uteri, hyperplasia endometrium, multiple cysts right ovary, corpus hemorrhagicum and fibrous cervicitis. That is my handwriting.

Q. That is the hospital record of her case.

A. On the second line and the last portion of the provisional diagnosis that is also my handwriting, secondary anemia.

Q. That was the pre-operative diagnosis.

A. Yes, but it was probably done subsequent to the operation, from my office records.

Mr. Anderson: We offer in evidence exhibit "1".

Mr. Bowen: We have no objection to the portion that Doctor Hatch thinks that he wrote, but we object to the other as being incompetent, irrelevant and hearsay and not properly identified and no proper foundation laid.

Mr. Anderson: This is a report made in the course of business at the hospital in each case, and in this particular case.

Q. Is that right Doctor? A. Yes sir.

Mr. Anderson: We offer it in evidence, we think now that the Doctor has identified it. [103]

Mr. Bowen: We renew our objection, the Doctor says it is not in his writing.

The Court: Would it come under the rule the same as a nurse's report who is in attendance on a patient, there would be more than one nurse and

(Testimony of Dr. H. Ray Hatch.)

they would be in attendance in the absence of a Doctor and those reports are admissible. We don't have to prove that the Doctor made all the entries. If it is a record kept by those in attendance, or by another physician who may have assisted. I understand that it is admissible, and it may be admitted.

Mr. Bowen: I agree to this extent that if he cannot read it as he says, it should not be admitted as having been identified by him.

The Court: If it is a record of the hospital and properly kept, it is admissible. Objection overruled.

Q. Doctor did you say that you removed the ovary to control the circulation of blood, is that what you said?

A. I thought at the time of the operation that in the process of removing this bleeding uterus, that the remaining blood supply to this right ovary was sufficiently interfered with to jeopardize the condition of the ovary subsequent to that.

Q. Does the uterus supply the circulation of the blood to the ovaries? [104]

A. There is a double supply to the ovaries, one from the pelvis and the other comes up the side of the uterus outward to reinforce the blood supply to the ovary.

Q. To both of them? A. To each ovary.

Q. You removed one?

A. Yes sir the right one.

Q. The other was left in *tack*?

A. Yes sir.

(Testimony of Dr. H. Ray Hatch.)

Q. That pre-operative diagnosis was cystic ovary? A. No sir, not entirely.

Mr. Anderson: I believe that's all.

Redirect Examination

By Mr. Bowen:

Q. I think you said that when Mrs. Stanger came to you in February 1940, you found some evidence of nervous emotional shock. I will ask you whether in your opinion the nervous and emotional shock produced by the accident was a contributing factor to the uterine bleeding, the bleeding for which you operated?

Mr. Anderson: Objected to as leading.

The Court: It is suggestive of an answer, sustained.

A. I will ask you Doctor, what is the fact as to whether or not in your opinion the nervous emotional shock [105] produced by the accident was a contributing factor to the uterine bleeding?

Mr. Anderson: Objected to further it is not proper redirect examination and also that there is no proper foundation laid.

Mr. Thompson: Also it is assuming a fact not established by the record.

The Court: Cannot the attending physician who examines a patient and has a history, give an opinion as to what the result might be. Of course, you have not gone far enough in informing the Doctor of the conditions. I will sustain the objection.

(Testimony of Dr. H. Ray Hatch.)

Mr. Bowen: Withdraw the question.

Q. Doctor, when Mrs. Stanger came to you in February 1940 did she tell you about the accident or the train wreck? A. Yes sir.

Q. Did she tell you something about it? What happened to her in the wreck?

A. Repeat that question please.

Q. Did she tell you about what happened to her when the wreck occurred?

A. No sir, I haven't a record of what happened to her with the exception of the accident.

Q. Do you have any independent recollection of what she [106] told you about this wreck she had been in?

The Court: Why don't you ask him a direct question?

Mr. Bowen: Very well.

Q. Doctor, do you have any independent recollection of Mrs. Stanger telling you in February 1940 of being in a train wreck?

A. I have a record of that.

Q. Independent of your record do you recall her telling you that?

A. That is in keeping with my record which I have refreshed my recollection and memory with, I have a notation of it here.

Q. Doctor, do your records show what she told you about this train wreck?

Mr. Thompson: I submit that he has testified that it doesn't.

(Testimony of Dr. H. Ray Hatch.)

Q. The Court: Does your record show what she told you about this accident.

A. The fact of an accident, she told me that and the effect of it.

The Court: Did she tell you when and where it occurred?

A. A train accident on the Union Pacific. I don't have the record, but I understood that it was somewhere near Denver, on January 14, 1941. [107]

Q. Would that be 41 or 40?

A. That would be 1940.

Q. And as to what happened in that accident?

A. The details you mean?

Q. Yes.

A. If she did, I don't have the story.

Q. You don't have any independent recollection of it at this time? A. No sir.

Q. Other than the physical examination of the uterus prior to the operation state what the fact is as to whether the condition you found of the pelvic organs, including the uterus, warranted the operation that was performed, aside from the bleeding?

A. That is the pre-operative examination?

Q. Yes.

A. I would say no, independent of the bleeding, no.

Q. Doctor, did you make any examination of the portions removed, after the operation was performed? A. Yes sir.

Q. What did that examination disclose?

(Testimony of Dr. H. Ray Hatch.)

A. A moderate fibrosis of the uterus, not particularly enlarged. Follicular cysts of the ovary with this blood clot in the recently ruptured ovarian follicle. A considerable thickening of the lining of the uterus.

Mr. Bowen: That is all. [108]

Recross Examination

By Mr. Anderson:

Q. Doctor, did you say that as to this bleeding it was not necessary to operate for that, is that what you said?

A. No sir. I intended to say was that the physical findings before the operation did not disclose enough definite abnormality to justify the operation if it had not been for this, what we thought, otherwise intractable bleeding.

Q. These other, or these abnormalities which you found were sufficient to cause the bleeding?

A. There is a question in my mind about it.

Q. Might and might not.

A. That's right.

Q. You perform several of these operations a month? A. No sir, I do not.

Q. You have performed quite a number in the past? A. Yes sir.

Q. And a great many that there was never a train wreck involved? A. That's right.

Mr. Anderson: That is all.

Mr. Bowen: That's all.

(Testimony of Dr. H. Ray Hatch.)

Mr. Bowen: May the Doctor be excused now?

Mr. Anderson: We have no objection.

A. G. STANGER [109]

being recalled, testified as follows:

Direct Examination

(continued)

Q. Mr. Stanger, have you noticed any physical difference in your ability to walk since the accident in January 1940, compared with before that?

A. Yes sir.

Q. What difference have you observed.

A. My right leg occasionally becomes numb. I don't know just how to explain it.

Mr. Thompson: I move to strike that, as not within the pleadings, not within the issues in this case.

Mr. Bowen: We raise that, we allege injuries to the back and spine.

The Court: Denied, go ahead.

Mr. Bowen: That is all, you may examine.

Cross Examination

By Mr. Anderson:

Q. Mr. Stanger, what time did you leave Denver that night?

A. About eight o'clock as I recall.

(Testimony of A. G. Stanger.)

Q. Traveling over the Colorado Southern to Houston, Texas?

A. Traveling on the C & S to Fort Worth and Dallas.

Q. How long did it take you to travel to Houston?

A. We were in Dallas the following morning and then in Houston the following morning after that. [110]

Q. About thirty-six hours?

A. I would have to add that up.

Q. How long were you in Houston?

A. I think the convention was three days.

Q. You were there during the convention?

A. Yes sir.

Q. Mrs. Stanger was there with you?

A. Yes sir.

Q. You went down to Mexico after the convention? A. Yes sir to Mexico City.

Q. How long were you there?

A. I cannot recall but we were gone from home about two weeks if I remember right we were there three or four days.

Q. You were in Mexico City about that time?

A. About three days.

Q. From Houston to Mexico City, did you go on the train? A. Yes sir.

Q. What did you do in Mexico City?

A. Visited some of the historic sites as best we could.

(Testimony of A. G. Stanger.)

Q. Traveled about in a sight-seeing car or automobile?
A. In a taxi.

Q. Leaving there you came back to where?

A. To Los Angeles, that is, we arrived there in the morning and left the same night for Idaho Falls.

Q. Did you travel on the train from Mexico City to Idaho Falls? [111]
A. Yes sir.

Q. You returned about January 31st?

A. Somewhere around there, either the 29th or 30th, around there.

Q. Then Mrs. Stanger went to Doctor Hatch on the 12th or 14th of February?

A. I don't know that.

Q. You heard Doctor Hatch testify that she just came there on February 12th.

A. I didn't pay any attention to the dates. I heard his testimony.

Q. This card table in that car, the top of it is just a little below the window sill of the car?

A. Yes sir.

Q. These seats of the car are cushioned both bottom and back?
A. I think generally.

Q. They make a bed out of these seats at night. The seats that you sit on are put together to make a bed?

A. They do some shuffling around but I am not acquainted with the movements.

Q. The seat was cushioned that you sat on?

A. Yes sir.

Q. You sank down in the cushion to some extent?

(Testimony of A. G. Stanger.)

A. Yes, I would say that the cushion would give.

Q. You would say that you sank in the cushion?

[112]

A. It is a relative matter.

Q. Well, they are soft seats. They are cushioned.

A. They are cushioned, but some are hard.

Q. The backs were cushioned too?

A. This same material.

Q. That was a standard sleeper.

A. There is a difference, a pullman and a standard.

Q. You travel quite a bit do you not, Mr. Stanger?

A. I am not acquainted with your terms.

Q. You didn't go in a tourist car.

A. I would not be surprised.

The Court: Now you are beginning to leave a doubt in this Court's mind as to how this man traveled. May I ask him a question of two here. Did you buy a ticket on the regular standard car of a tourist car.

A. I think a regular standard car.

The Court: Pullman car.

A. Yes sir, a pullman car.

Q. From Huston Texas,—withdraw that—From what you said I assume that for a remedy, or to get relief for your back that you seek rest?

A. That's right.

Q. What kind of rest? Do you lie down?

A. When I get deep therapy treatments I lie

(Testimony of A. G. Stanger.)

on my back,—I lie on my stomach and they put coils on my back, and [113] when I go home there are two methods, I either get in a tub of hot water or get an electric pad.

Q. When you leave the office two or three times a day you go home? A. Yes sir.

Q. And lie down? A. Yes sir.

Q. Did that give you relief?

A. When I use the pad.

Q. Moving about exaggerates your pain.

A. Sometime and sometimes it does not, it doesn't when it isn't so bad, but when it is bad I have to get relief.

Q. Exertion makes you tired and causes pain?

A. What do you mean by exertion?

Q. Well, you move about in your business.

A. Ordinarily it is at a desk but quite confining.

Q. You said that if bothered you to talk.

A. Occasionally.

Q. Do you get relief from that by resting and lying down? A. Yes sir.

Q. Do you notice any pain in twisting around, working around the garden and the lawn?

A. I haven't done any garden or lawn work for over two years.

Q. This pain is up about in the middle of your back, just below the shoulder blades.

A. About in there (indicating) just below the shoulder [114] blades. Just above the midsection of the back.

(Testimony of A. G. Stanger.)

Q. You used to play football?

A. Yes sir, I did.

Q. You had an injury to your shoulder and back in playing football.

A. I had an injury to my shoulder. A slight injury.

Q. In the vicinity of where *you* back is bothering you now.

A. No sir, it was on the point of the shoulder.

Q. You said that if you got plenty of rest that the pain didn't bother you?

A. If I get plenty of rest it doesn't bother like it does when I don't get the rest.

Q. And occasionally it drives you from your work.

A. That is correct.

Q. You play golf do you Mr. Stanger?

A. Occasionally.

Q. Do you know how many times you played in 1939 before you went on this trip?

A. No sir I haven't any recollection.

Q. Do you know how many times you played subsequent to that trip, in 1940?

A. Yes, a number of times in 1940 and a number of times this year.

Q. Some days you played thirty-six holes; and sometimes 18 holes in a day.

A. I don't think I ever played 36 holes, I have played 18 [115] occasionally.

Q. If I understand golf, you walk around and carry your club and swing at a ball.

(Testimony of A. G. Stanger.)

A. That is the usual procedure.

Q. And hope to hit it.

A. That's right.

Q. You are a pretty good golfer, what is your score for nine holes.

A. You are embarrassing me, sometimes you might be hot and other times you are terrible. I have on one or two occasions in my golfing experience made a fair score, I think the best was 39 and of course, there is no use telling how high I have been.

Q. That is about three over par for the Idaho Falls course.

A. I think par for that course was 35 and they then changed it to 36, I may be wrong about that.

Q. Your golf score was better in 1940 than it was in 1939.

A. I would say no better. However I will say that I started to play golf with some enthusiasm in 1939, prior to that I had played tennis.

Q. How many years have you played.

A. Very little before 1939.

Q. How many yards is that course at Idaho Falls?

A. I don't know. The score card tells but I don't know.

Q. Is it nine or eighteen holes?

Q. Eighteen now, but it was just finished last year.

(Testimony of A. G. Stanger.)

Q. *Usually* what is the distance between holes, some [116] fairways are four hundred yards.

A. The longest hole is about 420 yards. I may be wrong on this but I think that is correct.

Q. On some holes you have to walk up and down.

A. I wouldn't say any holes in particular, I would say that the course is rolling, especially the first nine holes and a few *swails*. The second nine is practically flat.

Q. You don't know how many times you played, but you would say it was several times a month.

A. I cannot answer the question. I don't keep track of how many times I play. I do play very little at times. I know that I played very little during the month of July,—in fact I played no golf whatever during that time.

Q. Isn't it a fact that your handicap dropped from 18 in 1939 to 14 in 1940.

A. I cannot answer that.

Q. You played in tournaments.

A. I played in one.

Q. You played in a tournament in Sun Valley.

A. I did.

Q. That was the Shippers and growers.

A. That is correct.

Q. And you won your match.

A. I think I was fortunate in that [117]

Q. Didn't you win the preliminary and the elimination.

A. I won a cup, temporarily.

(Testimony of A. G. Stanger.)

Q. The Gold course at Sun Valley is a more sporty course than the Idaho Falls course.

A. That is correct.

Q. After you play the first hole you go down to Trail Creek. A. That's right.

Q. On Number 7 you climb up to the bench again?

A. I don't remember the hole but you cross the creek and you play around the bench to one of the holes.

Q. It is more difficult to traverse than the Idaho Falls course.

A. I would say more strenuous.

Q. How many holes did you play in Sun Valley through the preliminary and the finals.

A. I think the first day it was 18 and the next day it was 18 more.

Q. When was the finals?

A. The finals were on the second day.

Q. Do you know what the distance is around that course? A. No sir I don't.

Q. Quite similar to the nine holes at Idaho Falls.

A. Well, it is some different, but so far as distance I don't know.

Q. How does it compare in yards or feet.

A. This is just a guess. I would say longer but I *may* [118] *wrong* on that.

Q. I think you are right. You have had your tonsils removed. A. Yes sir.

(Testimony of A. G. Stanger.)

Q. When was that done.

A. That was done the first or the middle of July this year.

Q. This year. A. Yes sir.

Q. You have had a number of teeth removed?

A. Yes sir.

Q. That was a number of years ago.

A. Yes sir.

Q. About when?

A. Five years and seven years ago.

Q. They were abscessed and you were having trouble with them.

A. They were not abscessed. I had a partial plate earlier in life and the plate would not stay tight. It was causing *my* considerable trouble so I decided to have them all out in order to get more convenience.

Q. Who examined you prior to that time.

A. To taking out the teeth.

Q. At the time you had them taken out, before you had them out.

A. I think Doctor Neilson.

Q. Where was he? A. Idaho Falls.

Q. He recommended that you have your teeth out?

A. Not necessarily but this bridge came loose and I had [119] them out.

Q. Before you had the bridge put in you had some teeth removed, did you?

A. No, I had an accident and had one broken

(Testimony of A. G. Stanger.)

off and one chipped which resulted in the bridge in front.

Q. This trip to Mayo's, you went there with your Father. A. That is correct.

Q. That was the only reason you went was because your Father was going and you met him and accompanied him to Mayos.

A. That is correct.

Q. You are quite a large shipper of freight over the Railroad.

A. We pay them thousands of dollars a year.

Q. Produce is what you ship.

A. Produce, coal, fertilizer, feed, and livestock.

Q. It is a fact that you have since this trip, endeavored to force the railroad to make payment on the theory that you are a good shipper of freight.

A. No sir.

Q. That is not true.

A. No sir, that isn't true.

Q. You didn't write to Mr. Jeffers on January 2, of this year. He is the president of the Union Pacific.

A. I did write to Mr. Jeffers, I don't remember the date.

Q. I show you what has been marked as defendant's exhibit [120] "2" that is a letter which you wrote to Mr. Jeffers? A. That's right.

Mr. Anderson: We offer exhibit "2" in evidence.

Mr. Bowen: Plaintiff objects to the introduction of this letter for the reason that it does not show

(Testimony of A. G. Stanger.)

any compromise and for that reason it is incompetent.

The Court: I have not seen the exhibit yet, you may go on with something else and I will look this letter over and rule later.

Mr. Anderson: I think that is all the cross-examination I have.

Redirect Examination

By Mr. Bowen:

Q. Now Mr. Stanger can you tell us now much golf you played in 1940?

A. I cannot. I don't know.

Q. Would you say that it was more or less than the preceding year, if you know.

A. I would say that I played less this year than last year, and less in 1940 than in 1939.

Q. What is the fact as to your ability to play this game through without resting?

A. I haven't been able to go through 18 holes without trouble, of course that all depends on the rest I have, [121] generally it is necessary to rest, that is due to this pain. At Sun Valley I took milk to the golf course with me. I can tend to eliminate some of the suffering by a glass of milk.

Q. What is the fact as to whether you suffer during the time you play?

A. Yes I suffer during the time I play.

Q. What is the fact as to whether you had to lie down on the golf course.

(Testimony of A. G. Stanger.)

A. Yes, I had to get some relief and to lie down was the way I could get it.

Q. What is the fact as to whether you had to give up games that is, stop certain games?

Mr. Thompson: Objected to as leading.

Mr. Witty: We have a right to lead this witness, this is redirect examination.

The Court: No you cannot lead on direct, redirect, or rebuttal. That is fundamental. Sustained.

Q. State whether you would play these games through after you started. A. Not always.

Q. Why?

A. Because of the pain I experienced.

Q. Where was the pain?

A. In the back generally. Sometimes in the leg, but generally in the back. [122]

Q. You stated about this trip down to Mexico City, state what you experienced in the way of physical experience on that trip?

A. It was necessary to have some attention due to the physical condition we found ourselves in, and it was necessary to get extra berths and cut the trip short on account of the physical condition we were not able to make some of the trips we originally planned.

Q. How did you travel from Denver to Houston?

A. By train.

Q. By Pullman or otherwise?

A. Pullman.

Q. Were you able to sleep at night?

(Testimony of A. G. Stanger.)

A. No sir.

Q. What did you do.

A. Well, we did the best we could under the circumstances. This accident which occurred so upset us that it was impossible to sleep. We rested the best we could. The Railroad furnished some extra pillows in the daytime to get as much relief as we could.

Q. What about your ability to sleep, does it affect you now?

Mr. Anderson: Objected to as leading.

The Court: Sustained.

Q. Have your nerves been affected any additionally since this wreck, any more than they were before?

Mr. Thompson: Objected as not redirect examination in any sense and would be only his conclusion.

The Court: It is not proper redirect, it seems that it is a part of their main case, but I will let him answer.

A. I would say so,—I become more easily fatigued and I do not sleep as restful as I did before the accident.

Mr. Bowen: That's all.

Recross Examination

By Mr. Anderson:

Q. But you are spending more time at the office than you did when you came back from Mexico.

(Testimony of A. G. Stanger.)

A. No. If it meets with your approval I can explain——

The Court: You have answered the question let's get along.

Q. I don't know whether the Court understands this game of golf——

The Court: If you are going to make an explanation for my benefit it is not necessary. I played the game only a couple of times but I understand how it is played.

Q. Then I will withdraw that question. How far do you generally drive the ball off the tee, that is, when you get a good drive.

A. I would have to say that generally I don't get a very good drive. [124]

Q. You swing just as hard whether you get a good or bad drive? A. Yes sir.

Q. You got good drives in Sun Valley?

A. Some good and some terrible.

Q. You beat Eddie Harper who was formerly state champion.

A. I don't know whether I played with Eddie or not.

Q. Don't you know who you played with in either the preliminary or the finals?

A. I really don't.

Q. You have played with Eddie Harper?

A. I have played with him, but I don't know whether he was in the foursome I was in or not.

Q. Mr. Anderson: That is all.

(Testimony of A. G. Stanger.)

Redirect Examination

By Mr. Bowen.

Q. Now Mr. Stanger you did go back to Mayo's?

Mr. Thompson: We object to this as leading and not proper redirect.

The Court: This thing is abusing the rules of evidence, you have each had about three chances at this witness. I will sustain this objection.

Mr. Bowen: That is all.

Mr. Anderson: That is all.

The Court: Now as to this exhibit, I think it was number "2" the letter. [125]

(Further argument by counsel.)

The Court: The objection is overruled. Admitted.

DEFENDANT'S EXHIBIT No. 2

IDAHO FALLS WAREHOUSE CO.

Bonded

A. E. Stanger

A. G. Stanger

Idaho Falls, Idaho

January 2, 1941

Mr. William M. Jeffers

c/o Union Pacific System

Omaha, Nebraska

Dear Mr. Jeffers:

It has been our experience that it is a good policy to bring about a friendly and mutual understand-

ing regarding the mistakes that have been made (intentional or otherwise), and that promptness regarding such incidents generally means for business relationships that prove profitable.

The writer would like very much to be able to start the New Year with a friendly feeling toward the Union Pacific System but incidentally it seems that such isn't going to be the case. Nearly a year has elapsed since the writer together with Mrs. Stanger had the misfortune of being in the wreck that took place just out of Denver. Since that time, little or no effort has been made by your personnel in charge of such cases to bring about a satisfactory settlement, and, as a result, it now becomes necessary to take this case to the Courts for their consideration.

Regardless of the outcome (win or lose) when Court Action becomes necessary, it doesn't make for the same mutual satisfaction and understanding as where such cases are closed by mutual consent.

The other day we had one of our good customers call us regarding an accident that took place in his new home. We had recently made installation of a splendid heating unit (furnace and stoker) and in some way or other just after the paper and painting had been completed something took place that resulted in a minor explosion. The new home was filled with smoke and soot. You can imagine the anger and disgust that the new owner and our customer felt.

It wasn't our fault—the job had been completed to their satisfaction—but nevertheless we felt we had an interest in their problem. Our interest was to the extent of making them satisfied, and although absolutely free from blame, we did what was reasonably requested by our customer. It was rather costly, but even now we find that our prompt interest in their problem [310] has made for friendliness, but very easily could have been the opposite. It has resulted in a relationship that continues to be pleasant and profitable due to our promptness and interest in their misfortune.

Being shippers of not only produce, but livestock, feeds, coal, fertilizer, bags, and so forth, and knowing that your welfare in this section is somewhat dependentt upon the good will you have with the shippers, it would seem that it is your problem of bringing to a happy conclusion with us as victims of this unfortunate accident in somewhat the same manner as we satisfied our good customer.

It is true that we have been called on a couple of times by your representative concerning this accident, but never have we been offered any definite settlement. Such things are unfortunate for all concerned, but in this particular, Mrs. Stanger is still under a Doctor's care, and to say the least it has been painful and trying.

It would be pleasant to be able to feel that our business is being appreciated and that we could boost and be a good will solicitor for your System.

Surely with the trucking situation becoming such a problem, the more satisfied customers you have the better are your chances for continued success.

The writer would very much like to bring to a satisfactory conclusion the problem that is now confronting us, resulting in a relationship that would tend to increase your tonnage and revenues instead of being short-hauled, penalized, and criticized, which is the general thing when discontent prevails. If this matter has to find its conclusion in the Courts, the Union Pacific will be the one to suffer financially in the long run.

If it becomes impossible to reach a mutual and satisfactory understanding with your representative after you've had time to give this your consideration, the writer, regardless, trusts that the New Year will be a happy and pleasant one to you.

Very truly yours,

(sgd.) A. G. STANGER

Mgr.

Idaho Falls (Bonded) Warehouse Company
AGS:em

[Endorsed]: Defendant's Exhibit No. 2. Admitted Oct. 20, 1941. [311]

PHYLLIS STANGER

Called as a witness on behalf of the plaintiffs after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Bowen.

Q. State your name? A. Phyllis Stanger.

Q. Where do you reside? A. Idaho Falls.

Q. Are you the wife of A. G. Stanger?

A. I am.

Q. You were his wife in January 1940.

A. Yes sir.

Q. How long have you and Mr. Stanger been married? A. Ten years.

Q. How many children do you have?

A. Three.

Q. Did you leave with your husband from Idaho Falls, on January 13, 1940 to take a trip toward Denver? A. I did.

Q. What kind of a train did you ride on?

A. The Union Pacific.

Q. A passenger train? [126] A. Pullman.

Q. Directing your attention to the 14th of January 1940, did you,—before the train you were on reached Denver do you recall anything happening?

A. I do.

Q. Just tell us how you were seated in the car?

A. I was going with the train on the west side of the car.

Q. Which way was your face? A. South.

(Testimony of Phyllis Stanger.)

Q. Toward the front of the train?

A. Toward the front of the train.

Q. Where was Mr. Stanger?

A. Opposite me, facing north.

Q. What were you doing at that time?

A. Playing bridge.

Q. What occurred just before this train reached Denver?

A. We had an accident. The car started,—the first thing we knew, there was a violent rocking back and forth of the train and before any of us had time to help ourselves it was crashed into the borrow pit. I was thrown against the table and then toward the side of the car.

Q. What table was it that you were thrown against?

A. The bridge table that we were playing bridge on.

Q. Describe what held that table up, was there any attachment? [127]

A. Fastened into the wall with a leg on the other side.

Q. Was it securely fastened to the wall?

A. It seemed to be.

Q. What portion of your body struck the table?

A. It struck me in the abdomen.

Q. Do you recall where else you were thrown?

A. Yes, as I hit the table it pushed me against the side of the car, and threw me against the car, my right side against the car.

(Testimony of Phyllis Stanger.)

Q. Do you recall and can you describe any cuts or injuries you received?

A. Yes, I got a cut on the leg at that time.

Q. Describe the interior of the car after you came to a stop.

A. As much as I could tell was there there was dirt, bolts and broken parts on the floor and the sides where the seats were, that is, the seats were jammed together, it was an awful mess.

Q. What happened to you after the car stopped?

A. I must have had hysterics. I laid there for a while until Mr. Hurst and Mr. Bush and Mr. Stanger helped me up. He helped me out of the car with the assistance of the other men. I had a terrific pain in the abdomen at that time.

Q. Were you able to walk out of the car?

A. I was assisted out of the car. They held my arms. [128]

Q. They assisted you out of the car?

A. Yes sir.

Mr. Anderson: I think that is leading, but go ahead.

Q. How were you assisted out of the car?

A. Mr. Stranger took one arm and Mr. Hurst the other.

Q. You were assisted, and where to?

A. To the door of the car. Mr. Hurst climbed out and assisted me out with the aid of the other men.

(Testimony of Phyllis Stanger.)

Q. And what happened then?

A. At that time we stood around. I had to have medical treatment. I had to get some treatment and Mr. Stranger had to get some help, a condition had started.

Q. What was that condition.

A. I started flowing. I had just finished my monthly period two or three days before we started the trip.

Q. What was the condition of the weather?

A. It was cold and there was snow. It was bitter outside.

Q. Did you go in to Denver from the scene of the wreck?

A. Yes sir, Mr. Stanger hired a car to take us to the station at Denver.

Q. Where did you go in the station?

A. To the ladies dressing room to see what I could do. I got into my things to see what I could do. I found a lot of things spoiled by some lotion that was broken. [129] At the time the railroad man who we were supposed to be the guests of during the day took us to their home and they called the road Doctor and he put some mercurochrome on my leg and something to stop this excessive flowing.

Q. What did you do then?

A. Rested for a while and they took us to the train to go to Houston.

Q. You went to Houston.

A. Yes sir.

(Testimony of Phyllis Stanger.)

Q. How did you go? A. On the train.

Q. In a Pullman? A. Yes sir a Pullman.

Q. What was your condition during the rest of the time, that trip to Houston?

A. I was very nervous and not able to sleep at all the first night. It was a business trip and of course Mr. Stanger had to attend some meetings, it was a business proposition with him, and while he attended the meeting I stayed at the hotel, I attended no meeting. I stayed at the hotel most of the time.

A. Why were you unable to sleep?

A. I had the sensation that we were having a wreck all the time.

Q. You accompanied Mr. Stanger on the entire trip, down to Mexico City? [130]

A. Yes sir.

Q. What was your condition during the remainder of the trip?

A. It was very miserable. We had planned to stay a week. I think we arrived there on Sunday evening and left Wednesday morning.

Q. You came back home then?

A. Yes sir.

Q. Do you remember the date you got back home?

A. About the 29 or 30th of January, we were gone about two weeks.

Q. What did you do after you got back home?

A. I was,—I knew that I had to have treatment.

(Testimony of Phyllis Stanger.)

I stayed in bed most of the time to see if I couldn't check it and finally went to the Doctor about two weeks after our trip back.

Q. Did that condition of flowing continue from the time of the wreck until you——

Mr. Thompson: Now up to this point this question is very leading and I object.

The Court: Yes, it is leading.

Mr. Bowen: I will try to reframe it.

Q. State what your condition was from the time of this wreck, the time it occurred until you went to the Doctor?

A. I continued this flowing and it became worse and worse. As time went on the nervous condition got worse and when I went to Doctor Hatch he tried methods that had—— [131]

Mr. Thompson: We object to this now, as not being responsive.

The Court: She may go ahead, maybe she has answered the question, but she may go ahead.

A. The Doctor tried to take care of me at that time and instead of the condition improving it still got worse. I became more nervous and excited and couldn't sleep at night.

Q. What Doctor did you go to?

A. Doctor Hatch. Ray Hatch.

Q. Prior to the time that this wreck occurred Mrs. Stanger did you maintain a home in Idaho Falls? A. Yes sir.

(Testimony of Phyllis Stanger.)

Q. Did you look after your house and do your work? A. Yes sir, I did all my work.

Q. Did you do your work without hired help?

Mr. Anderson: All of this is leading and suggestive.

The Court: Sustained. It is leading.

A. Did you do your own housework prior to the time you left on this trip? A. Yes sir.

Q. After you got back did you do your housework? A. No, I had help.

Q. For what period of time?

A. I had help all of the time. Continually until last three [132] days when I planned to go to Salt Lake City with a sick boy. I had help up to that time continually.

Q. Do you know who paid the help you had?

A. I did.

Q. Do you know how much you paid her?

A. I know how much I paid in money.

Q. That is what I want.

A. Ten dollars the first year and then seven to ten dollars but at the same time I boarded and roomed her.

Q. Doctor Hatch,—did he operate on you?

A. Yes sir.

Q. Do you remember the day of the operation?

A. Yes sir.

Q. What was the date? A. July 9.

Q. What year? A. 1940.

(Testimony of Phyllis Stanger.)

Q. Has that condition improved since the operation?
A. Yes.

Q. In what respect has it improved?

A. The hemorrhage has entirely stopped.

Q. Now, have you lost any weight since this accident?
A. I have lost about fifteen pounds.

Q. Previous to this trip in January 1940 what was your physical condition? [133]

A. My physical condition for three months previous had been perfect. I was in better condition than I had been for a long time. About three months before I had been to a Doctor because my period which was normally four days had gone into about a seven day period. He checked me up and I had been in perfectly normal health.

Q. That was how long you say that you had been healthy and normal?

A. About three months.

Q. Has Mr. Stanger complained about pain in any part of his body since this wreck?

A. Yes sir.

Q. What portion of the body has he complained about?

A. Experiencing extreme pain in the back.

Q. How often has he made this complaint?

A. Very frequently, and it is getting worse every day.

Q. Do you know whether he has come home during office hours?

A. Yes sir, it was unheard of before, but he

(Testimony of Phyllis Stanger.)

comes home now sometimes two and three times a day to put heat on his back.

Q. Prior to this accident what was his physical condition? A. It was very good.

Q. Did he ever have to come home and apply heat to his back? A. No sir.

Q. Did you ever hear him complain of pain in his back prior to the wreck? [134]

A. No sir.

Q. Did you experience any nervousness at that time? A. Prior to the wreck.

Q. I will ask you if you experience any now?

A. I still do.

Q. Do you have any difficulty sleeping at night?

A. Very much.

Q. At this time? A. Yes, very much.

Mr. Bowen: I think you may take the witness.

The Court: We will recess for ten minutes.

3:45 P. M. Oct. 20, 1941

The Court After considering this exhibit "1" the report of the Doctor. I am informed that a part of that is in the German language, if so then of course it will have to be interpreted because it may be pertinent.

Mr. Witty: If neither of us have it interpreted then I guess it will go in as it is.

The Court: Unless counsel agree that it doesn't relate to any regular record of the patient or have any bearing on this matter. I will have to have this

(Testimony of Phyllis Stanger.)

matter cleared up before the case is closed. I think I should inform you of that now.

Mr. Witty: May we take the exhibit during the recess of the Court. If we may take it until tomorrow to submit it to someone to interpret. [135]

The Court: Yes, you may do that.

Cross Examination

By Mr. Anderson:

Q. Mrs. Stanger, you were sitting in the right hand seat of the Pullman car?

A. Yes sir, going east.

Q. Toward Denver? A. Yes sir.

Q. Who was in the seat with you besides Mr. Stanger? A. Mr. Bush and Mr. Hurt.

Q. Where do they live?

A. Mr. Hurst is in Caldwell and I don't know where Mr. Bush is.

Q. Who was next to you? A. Mr. Bush.

Q. He was next to the window?

A. I was next to the window.

Q. Isn't it a fact that you were on the left hand side?

A. On the right hand side next to the window.

Q. Mr. Stanger was across from you?

A. Yes sir.

Q. What time did you get into Denver after this accident? A. I can't say definitely.

Q. About noon?

(Testimony of Phyllis Stanger.)

A. That is according to how long it took the car to get us in there. [136]

Q. You went out to some friends, the Colorado and Southern representative?

A. I had not met them previously. They were railroad people and they invited us as their guests that day.

Q. You went to their home?

A. Yes sir, that day.

Q. You went to a horse show that evening.

A. That afternoon.

Q. And back to their house?

A. Yes, and had dinner.

Q. Did you have dinner at the Denver Athletic Club?

A. Had dinner at their place before we went to the Horse show and then had dinner again at the Athletic Club after the horse show.

Q. You went to the train after that?

A. Yes sir.

Q. And went to Houston?

A. Yes, sir.

Q. And got there the following or the second morning?

A. Were in Houston on Tuesday morning.

Q. And you were there for three or four days?

A. Until Friday.

Q. And then went down to Old Mexico?

A. Yes sir. Arrived in Mexico City on Sunday and left on Wednesday. [137]

(Testimony of Phyllis Stanger.)

Q. And then went back to Los Angeles?

A. Yes sir, and then home.

Q. Did you remain in Los Angeles for some time?

A. Just between trains.

Q. What was the condition of the weather at the place of this derailment?

A. Freezing with snow on the ground.

Q. Before you left on this trip you went to a physician for treatment?

A. Yes sir.

Q. Who was the physician?

Q. Hoyt Wooley.

Q. What was your condition at that time?

Q. My periods had lasted four days and I was beginning to run into seven or eight days and I went to see him for that.

Q. Had you been to other Doctors for similar treatment?

A. No sir.

Q. Had you been to Doctor Miller?

A. He had taken care of me when I had the baby. Since then I had not been to him.

Q. Had you been to any Doctor for similar treatment given by Doctor Wooley?

A. No sir.

Q. Doctor Miller was your family physician?

A. Yes sir. [138]

Q. And was when your child was born?

A. Yes sir.

Q. He has been your family physician for some time?

A. Yes sir.

Q. How many children do you have?

A. Three.

(Testimony of Phyllis Stanger.)

Q. How old is the oldest? A. Nine.

Q. And the next? A. Six.

Q. The next? A. Two.

Q. All boys?

A. No sir the last one is a girl.

Q. You never had any assistance in your home?

A. No sir, except when I came home from the hospital with a baby.

Q. How big a home do you have?

A. A big five room home.

Q. Do you have any objection to Doctor Wooley testifying in this case? A. No sir, none at all.

Q. Or Doctor Miller.

A. No, sir.

Q. You have been troubled,—before you went to Doctor Wooley you were troubled with excessive flowing and [139] had been since the birth of your last child.

A. Not excessive but longer than most of my periods.

Q. It was over the normal period.

A. Yes sir, my normal.

Q. Could you tell me about how many days over the normal period?

A. As a rule my normal period was four days and this would be about a week.

Q. You have never gone to Doctor Miller at all to have this condition corrected? A. No sir.

Q. He had never planned on performing this same kind of operation that Doctor Hatch performed? A. Never.

(Testimony of Phyllis Stanger.)

Q. Doctor Wooley had never made an examination?

A. No sir, he never made an examination.

Q. He was giving you treatments?

A. Liver shots.

Q. To stop this flow of blood?

A. Yes sir, and it stopped it.

Q. He couldn't examine you while that condition existed? A. No sir.

Q. About October 10, Doctor Brothers examined you at Idaho Falls. A Doctor from Pocatello examined you at Idaho Falls?

A. I think it was that time, about the 9th or 10th. [140]

Q. You told him that you had had excessive menstruation periods ever since the last child was born?

A. I said I had gone over my normal menstruation period.

Q. Prior to the birth of this last child you were in the hospital for what they termed toxemia pregnancy?

A. I was in there I don't know the name of it.

Q. It was concerning pregnancy?

A. It was a sickness of the stomach, they had been feeding me and I couldn't keep it down.

Q. They said you had a threatened abortion?

A. That was in September 1938.

Q. And you had excessive flowing?

A. It was one night and then I stopped.

(Testimony of Phyllis Stanger.)

Q. Did you flow at all while you were pregnant with the other children? A. Never.

Q. When you went to Doctor Wooley did you have any—before you went on this trip tell me the symptoms other than flowing?

A. That was all.

Q. Were you nervous? A. No sir.

Q. Easily fatigued?

A. Not fatigued, I just felt that I was flowing too long.

Q. You were tired and run down? [141]

A. Still doing my work.

Q. Still run down. You felt different than normal.

A. I didn't feel that I was picking up as fast as I should.

Q. You did have some nervousness.

A. Not excessive.

Q. You did have some nervousness?

A. If I got over-tired.

Mr. Anderson: That is all.

Redirect Examination

By Mr. Bowen:

Q. Mrs. Stanger, you said you had some nervousness before you called Doctor Wooley. How did that degree of nervousness compare with the nervousness since this wreck?

A. I would not say that I was nervous at all compared to what I have been since the wreck.

(Testimony of Phyllis Stanger.)

Q. How long was it prior to the date that you went on this trip that you had last called on or been treated by Doctor Wooley.

A. I think the last time was the last of October or the middle of October. I went for a check-up and I was O. K. then.

Q. Did he tell you it was cleared up?

A. He said it was all cleared up.

Q. And from your own knowledge, was it cleared up? A. Yes sir. [142]

Q. All Doctor Wooley did was to give you some shots? A. Yes sir, Liver shots.

Mr. Bowen: That's all, thank you Mrs. Stanger.

Mr. Anderson: That is all. [143]

J. H. LYNN

Being called as a witness on behalf of the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Bowen:

Q. State your name please?

A. J. H. Lynn.

Q. What is your business or profession, and also give your residence, Doctor.

A. Pocatello, I am a physician.

Q. Are you regularly licensed to practice medicine and surgery in the State of Idaho?

A. Yes, I am.

(Testimony of J. H. Lynn.)

Q. Do you have your own hospital here?

A. I do.

Q. How long have you practiced medicine and surgery in the State of Idaho?

A. Since 1915.

Q. Assuming a man,—withdraw that please,—are you a graduate of any recognized school of medicine? A. I am.

Q. Can you tell us of any post graduate work or experience you have had?

A. Yes, eighteen months post graduate work in New York, interne preparation in Chicago. [144]

Q. Assuming that a man forty-one years of age, athletic, strong, able to perform his work in January 1940, and in good health. Assuming that on January 14, 1940 he would be riding in a passenger pullman car on a passenger train moving at a fast rate of speed; that he was sitting with his back in the direction the train was going, playing cards; that they were regular pullman seats, with cushions; that the train and the car he was in was suddenly derailed, the end of the car went into the borrow pit; that he would be thrown into the corner of the seat in which he was sitting, in a sitting position but bent forward, and otherwise thrown around in the car; that after the car came to rest he crawled out of the car and assisted the other people out of the car; that he walked over on the highway a short distance away and hailed a passing automobile and rode for a distance of approximately thirty

(Testimony of J. H. Lynn.)

miles in cold freezing weather; that he remained in a private home during the remainder of that day and that he left the City of Denver in the evening of that day around eight or nine o'clock on a pullman car; that shortly after the accident or immediately after, he complained of pain in his back, the upper portion of his spine that he traveled from Denver Colorado to Houston Texas by Pullman car; that he was unable to sleep or rest during the trip; that he remained at Houston approximately [145] three days and left by pullman, going to Mexico City and remained there three or four more days; from there he traveled to Los Angeles, and from there home; that he had, during that time, suffered pain in his back; that he arrived home the latter part of January 1940, and continued to suffer pain; that during the summer months, the extent is not known, he played some golf sometimes he played as much as nine holes without resting and other time this pain would be severe and he would have to lie down on the ground and conclude that game,—quit entirely; that he was able to play some golf this year, however, not as much as last year, with the same condition present as to having to lie on the ground during the time he was playing. Sometimes his right leg would become numb and pain him; that it was at intervals; that the pain in his back was not constant but would come on at intervals; that on some occasions that he was at his office,—he was engaged in office work, generally

(Testimony of J. H. Lynn.)

walking around and at times his back would become so painful that he would have to go home three or four times a day and put heat on his back or take a hot bath; that it would relieve this pain. Assuming that this pain continues, not constantly but at intervals up to the present time. Now, Doctor, in your opinion as a professional man would the accident, and the injury as I have outlined [146] be caused from an injury received in that wreck?

Mr. Thompson: Now we object on the grounds, First; that it is leading and suggestive. Second; It does not constitute a complete and correct statement of the record in this case. Third; that it is not expert in character, but is usurping the province of the Court.

I think the most recent United States Court decision is the Spaulding case of which Your Honor knows.

The Court: There is some question as to whether it is a complete and substantial statement of the evidence produced relating to the party you refer to. I recall some instances which were not repeated in your question. I don't understand that the Court has changed the general rule that if one is qualified in a certain line and a substantial statement is given him, I don't understand that the Spaulding case goes so far as to say that he cannot give his opinion. I think we will recess at this time until tomorrow morning and I will think this over during the evening.

October 21, 1941 10 o'clock A.M.

The Court: The objection to the witness now on the stand expressing an expert opinion based upon a hypothetical question in which there is narrated an assumed state of facts presented in the evidence, [147] presents the thought here as to whether an expert opinion can be received, such as the one attempted here, which is, "you may state if in your opinion as a professional man the injuries received could be from this wreck", I think that is about the wording of the inquiry. The inquiry then is, does this expert opinion present the ultimate issues to be decided by the Court upon all of the evidence as it is alleged in the complaint and denied in the answer. This question has been presented to the Supreme Court and also to the Ninth Circuit Court of Appeals in war risk insurance cases in which a hypothetical question was propounded to a physician quoting the facts in the case and attempting to elicit the opinion as to whether the injury was total, or amounted to total and permanent disability as provided before he could recover. The Supreme Court reached the conclusion in the Spaulding case that such an opinion could not be obtained from an expert because it was invading the province of the jury or the Court and was attempting to decide the ultimate issue in the case, which of course, is the province of the Court or the jury and is not a subject for expert opinion. Our Ninth Circuit Court of Appeals in a case that

went up from this District, I think the Stevens case. Before that time it was the rule that such a question could be asked and answered but they laid down the rule [148] that this inquiry could not be made as it was the ultimate issue for the jury or Court and to be decided by the Court of jury.

This question now, is asking a Doctor who never examined the plaintiff at all, upon an assumed state of facts to express an opinion as to the injuries alleged to have been caused by this accident. This is analogous to asking whether an injury is total and permanent. Did this accident cause these injuries, it is the same thing, the ultimate question here is did the Plaintiff receive the injury or any injury by reason of this accident. The same question as involved in the war risk insurance cases, as I review the Spaulding and the Stevens cases I think this is objectionable. Sustained.

Mr. Bowen: Is it necessary to ask for an exception.

The Court: There seems to be some question but you will be allowed an exception and there will be no question about it.

My attention has been called to exhibit "1" there was some question as to whether it was written in the German language, now, I am advised that it is not, it may be a little difficult to read but it is in English. Does Counsel have anything to say about that. If not we will not pursue it further. The exhibit was admitted. [149]

A. G. STANGER

Being recalled as a witness for the plaintiffs having heretofore been duly sworn, testifies as follows:

Cross Examination

By Mr. Anderson:

Q. I think you mentioned a number of *Doctor*, did you mention Doctor Warren or Warner who treated you?

A. I received treatments from Doctor Waner.

Q. He is a chiropractor or osteopath?

A. I don't know.

Q. Doctor Call is a chiropractor?

A. I think he is a chiropractor or osteopath.

Q. Doctor Rogers is also a chiropractor.

A. Yes sir.

Q. And lives at Pocatello? A. Yes sir.

Q. I believe you were away during the entire month of June 1940 were you not, to a convention in California, at Fresno. [150]

A. No sir, I was in Fresno but not on a convention.

Q. You were there in June 1940.

A. Yes sir.

Q. You and Mrs. Stanger drove down in an automobile. A. Yes sir.

Q. Were gone most of the month.

A. No sir, about ten days.

Mr. Anderson: That's all.

(Testimony of A. G. Stanger.)

Redirect Examination

By Mr. Bowen:

Q. Have you requested Doctor Rogers to come here and testify? A. Yes sir.

Q. Did he say he would?

A. He said he would be glad to do so but his health was so bad that he was afraid it would be disastrous.

Mr. Bowen: That is all.

Recross Examination

By Mr. Anderson:

Q. He is attending to his business affairs.

A. I cannot say as to that.

Q. When did you last see him?

A. I had a treatment last Sunday.

Q. He was at his office. A. Yes sir.

Mr. Anderson: That is all.

Redirect Examination

By Mr. Bowen: [151]

Q. What did he treat you for. What did he do?

Mr. Anderson: Object to that as not proper redirect examination.

The Court: Sustained.

Q. On this trip to California did you suffer any pain in any part of your body?

Mr. Anderson: Objected to as not proper redirect examination. The only thing he was asked about

(Testimony of A. G. Stanger.)

was his absence from California,—rather his absence from Idaho Falls.

The Court: Sustained.

Mr. Bowen: That is all.

Mr. Anderson: That is all.

Mr. Bowen: And at this time the plaintiff rests.

[152]

GEORGE O'RULLIAN

Being called as a witness on behalf of the defendant, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Anderson:

Q. State your name?

A. George O'Rullian.

Q. Where do you reside?

A. Idaho Falls Golf course.

Q. What is your business or profession?

A. Golf Professional.

Q. Is the Idaho Falls Golf course a city course.

A. Yes sir.

Q. You are the professional there?

A. Yes sir.

Q. How long have you been so employed?

A. Six years.

Q. Generally what do you do as a professional there?

A. Well there are quite a number of duties, the

(Testimony of George O'Rullian.)

main ones are to manage the club house, give golf lessons, promote golf and have charge of the grounds around the club house.

Q. Do you have charge of figuring the handicaps of the players? A. Yes.

Q. The players who take part in tournaments.

A. Yes sir. [153]

Q. And also arrange tournaments?

A. Yes sir.

Q. Are you acquainted with Mr. A. G. Stanger? A. Yes sir.

Q. He plays golf on the Idaho Falls Course where you are the professional?

A. Yes sir.

Q. Have you given him lessons?

A. Yes sir.

Q. State whether or not,—have you observed him playing also? A. Well, yes, I have.

Q. State whether or not in the lessons you have given him and in his play you have observed whether he has performed as an ordinary person?

Mr. Bowen: Objected to as incompetent, irrelevant and immaterial and calling for a conclusion of this witness and no proper foundation is laid.

The Court: Sustained.

Q. Can you tell me what Mr. Stanger's handicap is?

A. Yes, he has a handicap of fourteen.

Q. For what year?

A. 1939, 1940,—no, 1940 and 1941.

Q. Can you, from that handicap tell us approximately what his score is for nine or eighteen holes.

(Testimony of George O'Rullivan.)

A. From the way we figure our handicap, at fourteen on a 3/4 handicap basis it figures about 45 for 9 holes [154] or 90 for 18 holes.

Q. As average golfers go, is that a fair score?

A. Yes, it is an average score.

Q. Is there any physical effort or exertion used or necessary in playing golf?

A. Well, yes there is a physical effort to swinging the club. We try to teach a person to relax as much as we can in teaching them to swing.

Q. And to follow the swing through?

A. Yes sir.

Q. State whether or not that necessarily results in turning the back and twisting the back.

A. It requires a hip action. In the golf swing the hips and hands get most of the work.

Q. There is a swing of the shoulders and the back with the hips?

A. You pivot through the hips, and the actual swinging is through the hands.

Q. Is that a nine or eighteen hole course?

A. It is an eighteen hole course at the present time. We opened up the eighteen holes last year. It was nine before that.

Q. What is the yardage of that course?

A. The first nine is 3339 yards.

Q. For the first nine holes?

A. Yes sir. [155]

Q. And for the second nine?

(Testimony of George O'Rullivan.)

A. It is 3432 yards as near as I remember. No, the second nine is shorter than the first nine by about two hundred yards, I know it is around two hundred yards, that may be off two or three yards but that is close.

Q. Are you acquainted with the Sun Valley golf course? A. Yes sir.

Q. Have you ever played that?

A. Yes sir.

Q. Describe the topography of that course, as to whether it is hilly or level?

A. It is quite hilly, more hilly than the average run of golf courses.

Q. What makes it more,—let me ask, are there rivers or creeks?

A. Yes sir, you cross a creek several times and shoot down into a canyon and a couple of places there that you shoot up the hill.

Q. Is that quite a steep hill that you shoot up?

A. Yes sir, quite a steep hill.

Q. State whether or not in going up that hill,—going up to the green it is necessary to wind around a trail?

A. You walk down across a bridge and then up some steps to the green, you walk down first, and then up.

Mr. Anderson: That is all, you may cross examine. [156]

(Testimony of George O'Rullian.)

Cross Examination [156]

By Mr. Bowen.

Q. Isn't it true that during this year, 1941, on the Sun Valley course they would not allow you to play that up-hill hole?

A. I don't know about that, except that I was there about three weeks ago and we played it. If it is the hole I am thinking of, it is a short hole and you shoot over the creek, a three par hole I believe.

Q. In the early part of the year do you know whether they would allow anybody to play that hole?

A. I don't know. I know that we did as I told you. I know that they were on temporary greens in the fore part of the season and they went into July before they had them on the regular greens. I cannot say about that particular hole.

Q. It may be true that they would not let that hole be played?

A. It is possible.

Q. Did Mr. Stanger play as much golf in 1940 as he did in 1939 at the Idaho Falls Course.

A. I haven't the record of that. The City Clerk has the record on that. I wouldn't know off hand. You say in 1940 and 1939?

Q. Yes.

A. I cannot say as to that.

Q. Would you know if he played as much in 1941 as he did [157] in 1940?

A. I don't think he played as much this year as he did last year. I didn't see him as much.

Q. You were there constantly?

(Testimony of George O'Rullian.)

A. I am there most of the time.

Q. You don't attempt to say that Mr. Stanger was not suffering pain in his back while he was playing?

A. I don't know. I wasn't around him a great deal. I am with a number of golfers during the day. I don't go and talk to any one person and find out how they feel and so forth. It is just a passing hello, how are you, that is about all there is to it.

Q. You didn't observe him,—that is, you don't observe any of them constantly as they play?

A. No sir.

Q. Do you know whether or not Mr. Stanger in 1940 and 1941 took milk with him to drink, or whether he drinks milk at the club house?

A. I know that he had milk at the club house.

Q. Has he made any complaints of his back hurting him, to you?

A. No sir, he didn't say anything to me, to my knowledge, of course he might have and I would forget it, but I don't recall it now.

Q. You would not say that he had or had not?

A. I cannot say. It is one of those things that is hard to remember, he may have said something and I had forgotten. [158]

Q. As to whether during the time he would be playing this course whether he would lie down and rest, what about that?

(Testimony of George O'Rullian.)

A. I wouldn't know as to that, because I wasn't playing with him.

Q. Do you happen to know from your personal knowledge whether Mr. Stanger has ever quit a game during the course of the game because of his back?

Mr. Thompson: Objected to as calling for a conclusion of the witness.

The Court: Unless he knows.

A. I really don't know.

Q. I think I understood you to say that in playing golf, that the hitting of the ball requires a hip action. You said that to swing the hips and hands do most of the work?

A. That is right.

Mr. Bowen: That is all.

Redirect Examination

By Mr. Anderson.

Q. Explain to the Court just how you swing in playing golf.

A. This is just briefly because there is a lot of things to take into consideration, but the fundamental points to make up a good golf swing is the grip and the pivot action, the action of the hands and wrists and—well maybe if I put it to you in a different way,—in hitting a golf ball it requires the same action as cracking a whip, [159] the pivot is what keeps the body in position while you swing the club around, because the entire swing without that is very short. As you swing and come down

(Testimony of George O'Rullivan.)

you come into the ball and you develop that sweep through in the pivot as you come into the ball with the hands and wrists.

Q. Assume that you have a driver, when you drive off the tee, just make a regular swing, go through the motions for us.

(Witness demonstrates.)

Q. When you make the swing, the head of the club is in *front you* and next to the ball?

A. Yes sir.

Q. As you start the swing where is the head of the club?

A. Like this, about in this position (indicating).

Q. About three fourths through the swing it would be in what position?

A. The forward swing would be completed.

Q. And from the back swing before you start the down swing again it has made about three fourths of a circle?

A. Yes sir.

Q. And in that motion there is a pivot of the entire body, as you bring the swing through?

A. It would be mostly through the hips, and the left shoulder would come in line with the ball when you start, so that would be half way round. [160]

Q. There is a complete rotation of the entire body?

Mr. Bowen: Objected to as leading and suggestive.

The Court: It is leading. Sustained.

(Testimony of George O'Rullivan.)

Q. State whether or not in making this swing,—withdraw that,—state what the fact is when you make a back swing, and upward swing, whether the entire back moves and rotates?

A. You get most of that through here (indicating) in going back, and in going through with the swing you have a full turn this way (indicating).

Q. State whether you first twist your shoulders and twist your back?

A. Yes, first to the right and then to the left going through with the swing.

Mr. Anderson: That is all.

Recross Examination

By Mr. Bowen.

Q. All of the pivoting that you demonstrated is in the hips.

A. That is one thing that we try to stress in good form is to pivot through the hips.

Q. That is one of the main objectives of an instructor to see that is where the pivot takes place?

A. That is where the pivot starts.

Mr. Bowen: That is all.

Redirect Examination [161]

By Mr. Anderson.

Q. That is what you endeavor to teach?

A. Yes sir.

Q. State whether or not all golfers perform in that fashion?

(Testimony of George O'Rullian.)

Mr. Bowen: Objected to as calling for a conclusion, asking as to what all golfers do.

The Court: Sustained.

Mr. Anderson: That is all.

Mr. Bowen: Nothing further.

LEE WALKER

Being called as a witness on behalf of the defendant, after being first duly sworn testifies as follows:

Direct Examination

By Mr. Anderson.

Q. State your name? A. Lee Walker.

Q. Where do you reside? A. Idaho Falls.

Q. What is your occupation?

A. Clerk,—City Clerk of the city of Idaho Falls.

Q. How long have you been City Clerk?

A. About nine years.

Q. As City Clerk do you have under your care and custody the register of the golf course, showing who plays at the golf course at Idaho Falls?

[162]

A. Yes sir.

Q. I observe that you carried in a bundle of records, are those the records for 1939, 1940 and 1941?

A. The golf register sheets for 1939, 1940 and 1941.

(Testimony of Lee Walker.)

Q. Have you taken off, or made a summary of the number of rounds, together with the dates played by Mr. A. G. Stanger in the years 1939, 1940 and 1941? A. I have a record here.

Q. You have made such a record?

A. Yes sir.

Q. That is a summary?

A. Yes, showing the dates and the number of rounds for the three years.

Q. I show you what has been marked as defendant's exhibit "3" and I will ask you what it is?

A. This is the year 1939, the record for the year 1939.

Q. But the exhibit consists of four sheets.

A. Yes, two sheets for 1939 and one for 1940 and one for 1941.

Q. State whether or not that is a correct summary of the rounds played by Mr. A. G. Stanger, that you have taken from the original records?

Mr. Bowen: Objected to as calling for a conclusion of the witness and would be hearsay and incompetent, it is not shown who made the original records.

The Court: He said that he is the City Clerk [163] and the custodian of the records and the records cover this inquiry. This is the same situation as an auditor may make a summary and set up what he finds. These are public records I understand.

A. Yes, these are taken from the original records.

(Testimony of Lee Walker.)

The Court: You have offered them Mr. Anderson.

Mr. Anderson: Yes, Your Honor.

Mr. Bowen: May I ask a few questions on this exhibit before it is ruled on.

The Court: Yes, you may do so.

By Mr. Bowen:

Q. Referring to defendant's proposed exhibit "3" who makes up that record in the first instance?

A. The golfers sign the original records, the register.

Q. Who makes this record?

A. It is made up by whoever plays golf.

Q. You don't know whether they made them up correctly or not?

A. Well, they have to sign in when they play.

Q. Do you know whether they made them correctly or incorrectly?

A. I cannot say as to that.

Q. What happens after that, I mean, to the record.

A. The manager of the golf course turns them to me, to my office once a week.

Q. Are they handled by different persons?

A. Just the manager of the golf course. [164]

Q. Who handles them before you see them?

A. The starter and the golf course manager.

Q. You don't see them until they come to your office?

A. The only time is when I go to the golf course.

(Testimony of Lee Walker.)

Q. As to whether the contents are true or not of your own knowledge Mr. Walker?

A. That is what we have a man there for to make them.

Q. Do you know whether the contents are true, of your own personal knowledge? A. Yes sir.

Q. Are you sure?

A. Well, no, but we have a cash register out there that checks everybody.

Q. That is the only reason you know?

A. And we have an auditor that checks all the records.

Q. Who is the auditor?

A. Mr. Fred Ring.

Q. Does he do that before you get the records?

A. After I get them.

Q. Does his audit appear on this exhibit?

A. No sir.

Q. There is no audit connected with this?

A. Yes sir, he checks them.

Q. Is it frequently the case that players play there and do not register?

A. There are two men there to register them.

[165]

Q. Do you know whether it is true or not?

A. No, I am not sure of all of it.

Q. You don't make the original records?

A. No sir.

Q. And they are not made under your supervision? A. No sir.

(Testimony of Lee Walker.)

Q. They are turned over to you?

A. Turned to my office once a week.

Q. Who handles them after that?

A. Just the auditor when he checks them.

Mr. Bowen: We object to exhibit three, the year 1939 is outside the issues in this case. There is nothing in this case bearing on the year 1939. We object to the entire exhibit as being incompetent, irrelevant and immaterial, and not the best evidence. It is calling for a conclusion of this witness as to what may be or may not be in this record.

Mr. Anderson: We will concede his objection as to 1939, and submit the exhibit as to 1940 and 1941.

The Court: You say you have a cash register, what do you mean by a cash register?

A. They keep a record each time someone registers they sign the record.

Q. What is that register?

A. A National cash register. This register shows all this information. [166]

Q. That is transferred to your office?

A. I get the tickets once a week.

Q. Mr. Anderson: The person who plays golf, state whether or not the person who plays golf registers for himself?

A. Most of the time, but sometimes the starter registers him.

Mr. Anderson: And the records that you have prepared were taken from these registers which you have explained which are kept in your office

(Testimony of Lee Walker.)

and under your supervision, which you check to determine the receipts?

A. That is where we check all of the receipts of the golf course.

Mr. Bowen: Do you have any paid up memberships?

A. We have some fifteen year playing privileges taken out in 1934.

Mr. Bowen: And the players who are paid up do they register?

A. They must all register, they all go through the register.

Mr. Bowen: We renew our objection.

Mr. Anderson: We submit that it shows now that they are made up in the regular course of business.

The Court: Overruled, I don't know of a more accurate way you could do that.

Mr. Anderson: Now, I would like to remove the sheets having to do with the year 1939. [167]

Mr. Bowen: We object to the removal of any part of it, the record would become incomplete, and for the further reason that the objection we made applies 1940 and 1941 as well as 1939. The Court will observe that he played more in 1939 than either in 1940 or 41.

The Court: But you raised the specific objection that the year 1939 record had no bearing to any issue here, and I don't see what I can do now except to allow the other two years in and sustain

(Testimony of Lee Walker.)

your objection as this is not within the issues here.

Mr. Bowen: As to the specific objection to the year 1939 I wish to withdraw that objection.

The Court: Yes, you may do that, and now the entire thing is before the Court.

Mr. Bowen: Now is the entire exhibit in.

The Court: Yes, I understood you to withdraw the specific objection and to state that there was some connection between 1939 and the other two years.

Mr. Thompson: We are glad to have the whole thing in.

The Court: It is admitted.

Q. Now, Mr. Walker, referring to exhibit "3" I observe that opposite the dates you have some instances of 9 and some of 18, will you explain what that means?

Mr. Bowen: Objected to, no let it go.

The Court: This record must show that at the [168] time the Court ruled on the exhibit that the witness tendered the original record for examination by counsel.

Mr. Anderson: Yes, they are here I believe.

The Court: I understand Mr. Witness that the records are here?

A. The records are all here for the three years.

The Court: Here in Court.

A. Yes sir.

Q. By Mr. Anderson: Now, you may answer the former question.

(Testimony of Lee Walker.)

(Question read by reporter)

A. Nine means nine holes, and eighteen marked on there means 18 holes, two rounds or one round.

Q. Explain a round of golf.

A. We call nine holes a round.

Mr. Anderson: That is all, you may examine.

Cross Examination

By Mr. Bowen:

Q. Directing your attention to this bundle of records, do you know which ones I refer to?

A. Yes sir.

Q. Did you yourself prepare those records?

A. No sir.

Q. Were those records prepared from any information that you have in your office as custodian of those records?

A. The records were prepared when they were turned in to my office. [169]

Q. They are not prepared under your supervision, or in your office?

The Court: He is asking what you do in the way of preparing these records. Maybe I can clear this up. I understand that you are the City Clerk?

A. Yes.

The Court: Of Idaho Falls.

A. Yes, sir.

The Court: Are you the custodian of all of the public records of the City?

A. Yes sir.

(Testimony of Lee Walker.)

The Court: Do those records consist of the summary which you have testified about?

A. Yes sir.

The Court: What do you record on that summary?

A. The records that are turned over to me and I check the cash receipts.

The Court: Are they filed in your office?

A. Yes sir.

The Court: Do they remain in your custody?

A. They remain in my office.

The Court: Now go ahead.

Q. Who prepared the information that you have to make up those records?

A. That comes to me from the municipal golf course.

Q. Who prepares it? [170]

A. The golfer signs the register and the manager or starter enters whether he plays nine or eighteen holes. Whether he pays a green fee, or plays on a monthly ticket or a season ticket.

Q. They pass through two hands before they come to your office?

A. Two hands at the golf course.

Q. Can you tell from your own knowledge whether those are correct or not?

A. They are true and correct records?

Q. From your own knowledge,—to your personal knowledge is the information contained therein true and correct?

(Testimony of Lee Walker.)

A. All those records are true as far as I know.

Q. Is my question clear Mr. Walker?

A. Yes sir.

Q. Can you answer it?

A. I say they are correct.

Q. You know they are correct? A. Yes.

The Court: It is a question now of whether you have traced these records from the time they register until the records get to his office. What happens from the time the player walks up and registers. Maybe it might require some further proof. There might be a gap left there. [171]

A. We use,—if I might explain. We have a golf register right next to the cash register, and the player signs that and if he has a monthly ticket, he gives that and no money is paid at the time,—

The Court: —What counsel says is that there is a gap between that time and when it reaches your office.

Mr. Thompson: My understanding of the record to this point is this. It has been testified here that the player comes and signs his name, that I believe was testified to by Mr. O'Rullivan, and that was corroborated by this witness. After the player has played his golf then one of the persons in charge there makes 9 or 18 to indicate the number of holes as the case may be. That record having been made these sheets are then brought to the office of the City Clerk. This man becomes the permanent custodian of the records. I am quite clear on this,

(Testimony of Lee Walker.)

and am sure that I am correct, that he has said that he has made a summary from the entries on that register of this man's signature with the number of holes played, that he has made a summary and that makes up this exhibit. The records are here for counsel to refer to and see if what the witness says is correct.

The Court: It is just a question of tracing the record from the time the player registers until it reaches this man's office. [172]

Mr. Thompson: This man has testified to the procedure.

The Court: Yes, I think the procedure is cleared up. Objection overruled.

Mr. Bowen: That is all.

Mr. Anderson: That is all.

ROBERT J. LEWIS

being called as a witness on behalf of the defendant, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Anderson:

Q. State your name?

A. Robert J. Lewis.

Q. Where do you reside Mr. Lewis?

A. Denver.

Q. What is your occupation?

A. Locomotive engineer.

(Testimony of Robert J. Lewis.)

Q. How long have you been employed as a locomotive engineer? A. Thirty-two years.

Q. Were you so employed in January 1940?

A. Yes sir.

Q. What points were you running between?

A. At that time between Denver and Cheyenne.

Q. Were you on the train on January 14, 1940 when it derailed? A. Yes sir. [173]

Q. You were the engineer on that train?

A. Yes sir.

Q. Where did that derailment occur?

A. Station called Houston.

Q. Houston, Colorado?

A. Yes sir, it is merely a side-track for the loading of sugar beets.

Q. How far from Denver?

A. About thirty-seven miles.

Q. State whether or not it is on the main line from Omaha to Denver?

A. Yes, on the main line.

Q. At what point does it connect with the main line from Cheyenne to Denver?

A. At LaSalle.

Q. How far from Houston to LaSalle?

A. Eight or nine miles.

Q. Toward Denver?

A. I don't quite understand.

Q. Is Houston toward Denver from LaSalle?

A. Yes sir.

(Testimony of Robert J. Lewis.)

Q. What time-table direction do you call Houston?

A. Houston is east of LaSalle by time-table direction.

Q. In traveling from Houston to Denver, that would be considered what direction? A. East.

[174]

Q. Was that a passenger train?

A. Yes sir.

Q. What was the number of it? A. Four.

Q. When did you first know that there was a derailment, or that a derailment had occurred that day?

A. When the air brakes applied to the emergency due to the dividing of the train?

Q. What did you do?

A. The procedure was to keep the forward portion of the train moving so that the rear end would not overtake the detached portion. I released the brakes on the engine by means of independent brake valves to keep the engine working steam to keep the portions of the train from coming together.

Q. After the train stopped what did you do?

A. I shut off the steam head which was blowing out through the broken steam pipe, and I went back to ascertain the cause of the derailment.

Q. How many cars were attached to your engine at that time? A. Four.

Q. What did you find?

(Testimony of Robert J. Lewis.)

A. Upon going back to the rear truck of the fourth car I found a broken wheel on the right side of the truck, the lead wheel of the rear truck on the rear end of the fourth car.

Q. Was that a coach? [175]

A. Yes, a coach.

Q. Were there any pullmans on that train?

A. I think we had one standard pullman in the train.

Q. Was that to the rear of the coach that had the broken wheel.

A. Yes sir, it was to the rear. I think it was the sixth or the seventh car in the train.

Q. State whether or not the engine and four cars remained on the rails?

A. Yes sir, the four cars that were still coupled to the engine and which had broken away from the wrecked part were still on the rails.

Q. Did you place your hand on the wheel that was broken?

A. Yes, and also on the other wheels on the truck to see if there was heat in those wheels and there was not, only the normal running heat.

Q. How fast was the train traveling as you went through Houston?

A. Between sixty and sixty-five miles, the normal speed for that train.

Q. Was the train late or on time?

A. Late leaving Cheyenne and at the time of the accident.

(Testimony of Robert J. Lewis.)

Q. Had you made up any time between Cheyenne and LaSalle? A. No, I had not.

Q. State whether sixty and sixty-five miles an hour was the usual running time of that train. [176]

A. Yes, that is the usual running time of that train.

Q. Had you made any station stops between Cheyenne and Houston?

A. Yes, that train being a local train, we made practically all of the station stops for the loading and unloading of express and mail.

Q. Had you made any emergency stops that morning? A. No sir.

Q. Were the brakes applied at all as you approached or passed through Houston?

A. No sir.

Q. State whether or not you observed anything any different in the way the train or the engine rode as you passed through Houston?

A. No defect in the track that was noticeable on the engine.

Mr. Anderson: You may cross examine.

Cross Examination

By Mr. Bowen:

Q. How long have you been an engineer over that particular track where the wreck occurred, prior to that time?

A. I have been running over that piece of track since being employed by the Union Pacific, that would be for thirty-two years.

(Testimony of Robert J. Lewis.)

Q. When you went back to where the wreck occurred, how many cars were off the rails?

A. There was a tourist car that was completely off the rails, [177] a standard pullman and a tourist car and I think one other and that was a tourist car back at the read end.

Q. The portion of the train that broke off had how many cars? A. Four.

Q. And three of the four were off the track?

A. Yes sir.

Q. Were the rails spread at the point of the wreck? A. Yes sir.

Q. The rails were spread? A. Yes sir.

Q. How much were they spread?

A. Well, the track was torn completely up due to the wreckage.

Q. Is it a part of your duty to make inspections of wheels on passenger cars just in the ordinary course of your duty Mr. Lewis?

A. No sir, it is not.

Q. That is not one of your duties?

A. No.

Q. As to when these wheels were inspected,—the wheel that broke,—as to when the wheels on that car were inspected and what the inspection consisted of, you don't know?

A. No, I don't know.

Q. How was the weather at that time? [178]

A. It had been snowing the night before. It was quite cold and there was three or four inches of snow on the ground.

(Testimony of Robert J. Lewis.)

Q. Do you recall the position of the pullman car after you got back after the wreck?

A. It was leaning over at quite an angle. It wasn't completely over, I don't think.

Q. Do you recall in the direction you were going, which side of the track the pullman car was off on?

A. To the right.

Q. Was it tipped toward the road?

A. What is the fact as to whether one end was higher than the other end?

A. I don't recall just the position of the cars, but I do know that they were laying at an angle.

Q. Tell us how deep the borrow pit was at the side of the track where this car was laying?

A. Just a slight embankment. There is not much there due to the grading of the track.

Q. The ground was frozen? A. Yes sir.

Q. Did you look inside the pullman car?

A. No sir, I didn't go into the pullman.

Q. Do you know where the trucks on the pullman were? A. Where the trucks were.

Q. Do you know where they were as to being under the car or off to the side? [179]

A. No sir, I cannot recall just where they were.

Q. What type of engine was on this train?

A. Type 484.

Q. Is that the regular type on that run?

A. Yes sir.

Q. How long had that been used on that run?

A. They had been used in passenger service since they came to the Union Pacific about 1939.

(Testimony of Robert J. Lewis.)

Q. As to the gauge of the track being wide or tight at the point of the wreck do you know about that? A. I don't know.

Q. Could have been tight or wide?

A. Could have been either, yes.

Q. When you say there was no defect, you didn't refer to that defect? A. No I didn't.

Q. Can you tell us the type or make of wheel that you spoke of as being broken? A. No sir.

Q. You didn't know how long it had been in service either? A. No sir.

Q. Do you know what became of the wheel after it broke? A. No sir.

Q. Have you seen the broken portion of the wheel since the wreck? A. No sir. [180]

Q. Could you describe a little more in detail how the wheel was broken through? Was it through the center or how?

Mr. Anderson: I think that is improper cross examination and we object on that ground. I will say that we have a witness as to this matter.

The Court: Overruled.

A. At the time the wheel broke as I say, I examined the broken wheel, but how many pieces it was broken in I am unable to say.

Q. Was it broken in several pieces, and was it broken entirely off the axle?

A. The web of the wheel was intact on the axle and the rim was gone.

Q. Do you know how far the car moved from the

(Testimony of Robert J. Lewis.)

time the wheel broke, up to the time the wreck occurred?

A. If the wheel broke and caused the wreck I would not be able to state how far the cars would move before they derailed.

Q. Had you been—withdraw that—Do you happen to know Mr. Lewis, how far back of the point the car actually derailed that any broken portions of the wheel were, I am asking if you know at what point back of the point of the accident it was that the wheel broke?

A. No sir, I cannot tell that.

Q. Then from your own personal knowledge you would not be able to state whether the wreck caused the broken wheel [181] or the broken wheel caused the wreck.

Mr. Thompson: We have no fear of this matter whatever, but it has gone entirely beyond the direct examination. We have witnesses who are experts here to testify as to these matters and I leave it to Your Honor upon the sole ground that it exceeds the bounds of direct examination and is not proper cross.

The Court: He may answer if he knows.

A. No sir, I don't know.

Mr. Bowen: That's all.

Redirect Examination

By Mr. Anderson:

Q. Counsel insisted upon your answering a ques-

(Testimony of Robert J. Lewis.)

tion concerning spread track. Do you understand what he meant?

A. I presume that he meant did a spread track cause the wreck.

Q. What is a spread track?

A. Where the gauge of the track was wider than the traction of the wheels. In this instance it was not or the engine would not have gone over.

Q. The engine remained on the track?

A. The engine and four cars. If the track was spread they would not have gone over.

Q. What is the comparison between the engine and a car as far as weight is concerned?

A. An engine of that type weighs in the neighborhood of [182] two hundred and some odd tons, and the weight of a baggage car and a standard pullman is ninety or a hundred tons.

Q. The part of the wheel that you inspected, was that on the axle?

A. Yes, that part on the axle.

Q. The plate of the wheel?

A. Yes sir.

Mr. Anderson: That is all.

Recross Examination

By Mr. Bowen:

Q. After you got back to the wreck were any of the rails broken?

A. The rails were badly twisted.

Q. Do you know whether they were broken?

A. I don't know. I didn't inspect them.

(Testimony of Robert J. Lewis.)

Q. They may or may not have been broken.

A. They may or may not, I wouldn't say as to that.

Mr. Bowen: That is all.

Mr. Anderson: Yes, that is all Mr. Lewis.

The Court: We will recess for ten minutes.

ALBERT GARDNER

being called as a witness on behalf of the defendant,
after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Anderson: [183]

Q. State your name please?

A. Albert Gardner.

Q. Where do you reside Mr. Gardner?

A. Platteville, Colorado.

Q. What is your occupation?

A. Section Foreman.

Q. For whom are you a section foreman.

A. The Union Pacific Railroad Company.

Q. For how long have you been a section foreman.
A. 29 years.

Q. Were you at Platteville on January 14, 1940?

A. Yes sir.

Q. What portion of the track are you foreman of?

A. From Mile post 32 to 41½ known as the Northern district including Houston, Platteville and Gilcrest.

(Testimony of Albert Gardner.)

Q. How long have you been on that section?

A. The past six years.

Q. That includes Houston, Colorado?

A. Yes sir.

Q. Did you state how long you have been a section foreman? A. Yes sir, for 29 years.

Q. Do you have a gang of men working under your jurisdiction?

A. Yes sir we have an allowance, and the men vary, the number varies in the winter and summer.

Q. State your duties as Section foreman, what do you do?

A. The section foreman with a gang has a territory known [184] as his section and it is his duty to care for and maintain that mileage of track and to keep it in a condition safe for the normal speed of that territory.

Q. Do you recall a derailment at Houston January 14, 1940? A. Yes sir.

Q. Did that occur on Sunday?

A. Yes sir, on Sunday.

Q. Are you on duty on Sunday?

A. No sir, not on duty, but subject to call.

Q. Did you go to the derailment after you found out it had occurred? A. Yes sir.

Q. What did you do after you got there? Did you inspect the track? A. Yes sir.

Mr. Bowen: Objected to as leading.

The Court: It was leading.

Q. State what you did.

A. To make it clear, I have two daughters and

(Testimony of Albert Gardner.)

it is 90 feet from the center of the track to United States highway 85, my daughters were driving and they let me out at the point where we saw the train, the engine and part of the train up the track and the other off the track. I came up the track the way the train came looking for defects that might have caused the wreck.

Q. Was that west of Houston? [185]

A. Yes sir.

Q. How far,—first did you walk along the track, did you say that Mr. Gardner? A. Yes.

Q. How far did you walk along the track before you got to the east end,—the east switch of the Houston siding?

A. That is where I parked the car. I pulled in at the switch and had to walk about ten steps or so and I was on the track west of the wreck.

Q. Did you inspect the track west of the east frog and switch? A. Yes sir.

Q. Did you find any evidence of anything about the track that indicated anything had been dragging?

Mr. Bowen: Objected to as leading.

The Court: It might be suggestive of an answer. Sustained.

Q. Did you inspect the track west of the point of the east Frog? A. Yes sir.

Q. What did you find? A. Nothing.

Q. What area did you cover by the inspection and what did you find?

(Testimony of Albert Gardner.)

A. I covered a space of about five hundred feet to see if I could find any nicks on the rails, to see if there was something dragging or some defect that caused this wreck [186]

Q. Where did you find any nick on the rail?

A. Near the center of the switch about 19 or 20 feet from the frog.

Q. East or west frog? A. East.

Q. Toward Denver? A. Yes sir.

Q. What was the nature of this mark?

A. It was a flat place about one-half inch, like something had been pounded into the top of the ball of the rail.

Q. What is the ball of the rail?

A. That is where the wheel runs on the rail.

Q. What did you find *that* other than that?

A. Nothing west of that, but east sixteen feet or so further was where the rail had began to break away and was torn out from there on.

Q. How many rails broken out?

A. I cannot state how many positively but around three hundred feet.

Q. Do you know what caused the rail to break?

A. Apparently it was the broken wheel.

Q. Had you been over that portion of the track the day before?

Mr. Bowen: Objected to as leading, the question is suggestive and self serving.

The Court: That would be leading you say Mr. Bowen. I don't think so. Overruled. [187]

A. Yes sir.

(Testimony of Albert Gardner.)

Q. What did you do about the track at this point?

A. We have a line of work that requires us to inspect the track. That is, there is a line of work that is required of us. Once a week we must inspect all switches. That is required of us. At this time on Saturday I inspected this switch. That inspection consists of trying the switch, testing the gauge, the frog, center ordinance and switch points.

Q. What was the condition of that track at that time? A. Perfect condition.

Q. What kind of road bed is there at that point. Will you explain it?

A. It consists of Sherman gravel from eight inches to better than eight inches under the ties, they are good treated ties, tie plates and 110 pound rail 39 foot sections laid in 1932.

Mr. Anderson: You may cross examine.

Cross Examination

By Mr. Bowen:

Q. You said that was 110 pound rail?

A. Yes sir.

Q. How much heavier rail is in use on different portions of the Union Pacific Railroad.

A. 131 pound is the heaviest.

Q. That was not the heaviest rail. [188]

A. No sir.

Q. Do you know how old it was?

A. It was rolled in 1931—7/1931.

Q. Made or laid at that time.

(Testimony of Albert Gardner.)

A. Made at that time.

Q. Mr. Gardner, how often do the rules require that you inspect the tracks and switches?

A. Once a week.

Q. Do you have any particular time that you do that work? A. Not as a set rule.

Q. You say not as a set rule?

A. No sir, not as a rule, that is a set rule.

Q. When did you inspect this switch and points prior to the 13th of January?

A. Prior,—it would be on the following close of the week,—no, I don't mean the following, I mean the prior week instead of the following.

Q. Did you keep a record in any book of the time you inspected this switch point?

A. Yes sir and required to make a report every Saturday of what switches were inspected and what was done to them.

Q. How long was it that you had done any work at the point of this wreck?

A. There was no work done there for over thirty days, only cleaning the snow. [189]

Q. No work done for thirty days?

A. Only cleaning snow out of the switch.

Q. Of course, if those inspections are not made by you, what happens to you and your job?

A. I don't have any job left.

Q. You used the word derailment, is there any difference between a derailment and a wreck?

A. Yes.

Q. There is a difference. A. Yes.

(Testimony of Albert Gardner.)

Q. Which was this, a derailment or wreck.

A. A derailment.

Q. And what is a wreck?

A. Well, two cars can come together and not have a derailment but still there would be a wreck.

Q. Do you know how many cars were off the track? A. Four.

Q. Did you observe the position of the pullman car at the scene of the wreck? A. Yes sir.

Q. Can you describe its location?

A. Yes, it was between the last car and the car ahead of it. The third car back.

Q. Which side of the track was it off.

A. The south side. [190]

Q. And in the direction in which the train was running, on which side would that be, the right or the left? A. The right hand side.

Q. How was it laying with respect to being parallel with the track or otherwise?

A. The south end or the end next to the train, next to the engine was next to the track, it was nearer to the track than the other end.

Q. Was one end higher than the other end?

A. Yes sir, slightly and tilted toward the track.

Q. It was not tilted away from the track?

A. As my memory serves me it was toward the track.

Q. Did you look inside of the pullman car?

A. No sir, I didn't look inside of the pullman.

Q. All of your inspection was made after this wreck occurred.

(Testimony of Albert Gardner.)

A. No sir, the inspection was before,—you mean the inspection of the wreck.

A. And the track you spoke about.

A. I wasn't there that morning before the wreck, so it was after the wreck on that date, after I got there.

Q. What time Saturday did you make the inspection of the track?

A. Between eleven and twelve o'clock.

Q. In the forenoon? A. Yes sir.

Q. As to what may have occurred to the track between that [191] time and the time the wreck occurred you wouldn't know?

A. No sir, I wouldn't.

Q. As to the condition the track was in as to being a tight or wide gauge you wouldn't know that,—at the time the wreck occurred?

A. No, I wouldn't know.

Q. I believe you stated that about three hundred feet of the rails was broken out at the scene of the wreck? A. From the switch point east.

Q. Did you examine the rails that were broken out? A. Yes sir.

Q. As to what the gauge was on the engine that was on the train as to whether that was tight or wide you do not propose to testify?

A. No sir, I do not know that.

Q. As to anything about the age of this wheel that you testified to as being broken, or anything about the wheel, you don't know.

A. No sir.

(Testimony of Albert Gardner.)

Q. Did you look at the wheel?

A. I saw the wheel, yes sir. They brought the parts of the wheel and put them on the push car that I have to handle material on, but I had nothing to do with that. It was in the mechanical department.

Q. Do you know how many pieces the wheel was broken in? [192]

A. No sir, I cannot testify as to the amount of pieces.

Q. Your inspection, you say you went back five hundred feet beyond the scene of the wreck?

A. Yes sir.

Q. You didn't go back further than that?

A. No sir, not on that date.

Mr. Bowen: That is all.

Redirect Examination

By Mr. Anderson:

Q. Where is the frog with reference to mark on top of the rail. How far is the frog from where the marks were on top of the rail?

A. Nineteen feet as I remember.

Q. Was there any damage to the frog?

A. None whatever to the frog. That frog is still in service without any work on it.

Q. State whether you saw any train pass over this portion of the track after you made the inspection on Saturday.

A. Yes sir, the regular scheduled trains all the way up to the time this train was derailed went

(Testimony of Albert Gardner.)

over that.

Q. State whether or not these rails are spiked to the ties?

A. Yes sir, it sets on a straight track there, the track and the switches with two spikes to each tie on each side.

Q. Was that done in this instance.

A. Yes sir, *ever* tie had spikes.

Q. Was this straight track or curves? [193]

A. Straight track.

Q. What have you to say with reference to the gauge of that track generally, and at the point of derailment?

A. It was a perfect gauge.

Mr. Anderson: That is all.

Recross Examination

By Mr. Bowen.

Q. What was the condition of the weather at the time and immediately before the wreck?

A. It was cold. I should judge eight or ten above zero.

Q. Was it freezing?

A. Yes sir, below freezing when this occurred.

Q. Have you had any experience as a Section foreman with broken rails caused from cold weather, either too tight or too loose?

A. We don't have broken rails such as we do in bolts and joints.

Q. Have you had broken rails or joints?

A. Not in this class of rails.

Q. Never heard of one?

(Testimony of Albert Gardner.)

A. Yes, I have heard of them but I never had any.

Q. When rails break from cold weather how long does that take? Assuming that the weather is cold enough to freeze and the rail does break, does it break right now, suddenly?

Mr. Anderson: Objected to as not proper recross [194] and it assumes that they do break. This witness has not said that they do.

The Court: I don't think he went into this,—well, I believe he may answer.

A. When they do break it is quick.

Mr. Bowen: That is all.

Mr. Anderson: That is all.

The Court: We will recess at this time until 2 o'clock.

2 o'clock P. M. Oct. 21, 1941.

Mr. Bowen: The plaintiff, at this time, moves that all the testimony of Mr. Gardner the witness who testifies with reference to the broken car wheel and the broken rails as being possible explanations for the wreck of this train be stricken on the ground that it constitutes and is an affirmative defense of the defendant and no affirmative defense is plead. There is no affirmative defense in the answer of the defendant. We think this comes within sub-division C of rule 8 of the rules of this Court. We had no means of meeting this defense of a broken wheel or

rail as a possible explanation of this train wreck. It is affirmative matter and constitutes an affirmative defense and as I say no affirmative defense has been plead, and according to the rule I cited it must be set out affirmatively. We had no way of preparing for the defense of a broken wheel. [195] As to whether they were negligent in permitting that wheel to go upon the rails in this manner we had no advice of what the defense would be.

Mr. Thompson: The defendant was charged with negligence in failing to carry the plaintiffs safely as passengers. That was denied and the issue was thereby made. The issue was properly joined on the question of negligence as I think, notwithstanding the rule, I think the rule relates to those things which one pleads in confession and avoidance and such things as the statute of limitations. Having gone to trial and proceeded with the testimony of these witnesses without raising such objection they are estopped under any circumstances to now interpose such an objection.

The Court: I will check this up and you can proceed at this time.

CLIFFORD M. CLINE

being called as a witness on behalf of the defendant, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Anderson:

Q. State your name please.

(Testimony of Clifford M. Cline.)

A. Clifford M. Cline.

Q. What is your profession? [196]

A. Surgeon.

Q. Where do you reside?

A. Idaho Falls, Idaho.

Q. How long have you resided there?

A. Since 1912.

Q. What college are you a graduate of?

A. Northwestern.

Q. Graduated as a physician and surgeon?

A. Yes sir.

Q. Are you licensed to practice in Idaho as a physician and surgeon? A. I am.

Q. Are you engaged in the General practice at Idaho Falls? A. Yes sir.

Q. And have been since 1921? A. Yes sir.

Q. In your general practice does that,—state whether or not that includes the taking of X rays?

A. The reading of X rays.

Q. The reading of them? A. Yes sir.

Q. Did you sometime in July make an examination of A. G. Stanger? A. I did.

Q. Can you tell me when that was, and what your examination consisted of?

A. May I refer to my notes? [197]

Q. You may refer to them, yes.

Q. The examination was made on July 31, 1940.

Q. What does your examination notes disclose?

A. That it consisted of a thorough physical examination plus X ray pictures. X ray pictures of the spine.

(Testimony of Clifford M. Cline.)

Q. Did you in addition to the X ray pictures make some examination of his back?

A. Yes, a complete physical examination.

Q. What did you do with reference to your examination concerning his back, except the X rays?

A. A physical examination.

Q. What did you have him do, if anything?

A. I made a thorough examination to determine about pain and curvature or what have you.

Q. What did you have him do?

A. To go through various motions of the spine.

Q. I show you Doctor, what has been marked for identification as exhibits 4, 5 and 6. Are those X rays which were taken of Mr. Stanger's back?

A. They are.

Q. Did you take them?

A. My X ray technician took them.

Q. Do you know that they are X ray pictures of Mr. Stanger?

A. I do.

Q. Taken in the regular course of taking X rays?

A. Yes sir. [198]

Mr. Anderson: We offer defendant's exhibits 4, 5 and 6.

Mr. Bowen: May we ask a question or two in aid of objection?

The Court: You may, yes.

By Mr. Bowen:

Q. Doctor, at whose request did you make this examination and take the X rays?

(Testimony of Clifford M. Cline.)

A. I have forgotten the name of the gentleman, but he was associated with the Union Pacific.

Q. You don't recall who it was?

A. I think the name was Winchell or something like that.

Q. Did you make an examination and did you take these X rays for the purpose of treating Mr. Stanger? A. I did not.

Q. For what reason did you make this examination and take the X rays?

A. At the request of the Union Pacific or of this gentleman from the Union Pacific.

Q. You were not requested by any other person?

A. No, sir, I wasn't.

Mr. Thompson: You know that Mr. Stanger gave us authority to have him physically examined did you not?

Mr. Bowen: I think this examination and the pictures come under this rule of privileged testimony.

Mr. Thompson: I think Your Honor, that we can [199] shorten this up.

The Court: Very well, go ahead.

By Mr. Anderson:

Q. Doctor showing you exhibit "7" is that the authorization under which you proceeded to examine Mr. Stanger? A. As I recall, it is.

Mr. Anderson: We offer in evidence exhibit "7".

(Testimony of Clifford M. Cline.)

By Mr. Bowen:

Q. Did you receive proposed exhibit "7" before you made this examination?

A. There was some certificate of authorization shown me but I didn't have it in my possession.

Q. Is defendant's exhibit "7" the authorization?

A. As I said, I think it is.

Q. Will you say that it is or is not?

A. I believe it is.

Mr. Bowen: May I ask another question on this exhibit now?

The Court: You may do so.

By Mr. Bowen:

Q. At the time you received the proposed exhibit "7" were you in possession of any information or records regarding Mr. Stanger?

A. None whatever.

Q. You had none at the time you received that exhibit? A. No, sir. [200]

Q. This authorization merely gives you the right to give the railroad company any information or copies of information you have?

Mr. Thompson: The exhibit speaks for itself and we object to this question for that reason.

The Court: Sustained.

The Court: Did you receive this after you made the examination?

A. Before, it was handed to me before, although I didn't have it in my possession.

Mr. Thompson: We do not rest our right of ex-

(Testimony of Clifford M. Cline.)

amination entirely on that. That merely was an acknowledgment of willingness that we might make inquiry and examination concerning his physical condition. The record shows that he voluntarily appeared before the physician of our selection and the Doctor says here that it was not for the purpose of treating him or prescribing for him. So there is no reason why the Doctor should not testify here.

The Court: What did you understand as to the circumstances that Mr. Stanger came to you for examination. Did he employ you?

A. At no time.

The Court: What did you understand.

A. I understood from this gentleman that brought this exhibit, that Mr. Stanger was coming for examination. [201] Mr. Stanger phoned for an appointment and I made it and examined him for a report for the Railroad Company.

The Court: What did Mr. Stanger say to you?

A. He said that he had been requested by the Railroad Company to come for an examination by me.

The Court: He came and you examined him?

A. Yes, sir.

The Court: This is a voluntary appearance. It is not the position of physician and patient. It comes under that rule where one comes and submits to an examination by the adverse party. He didn't come as a patient. He knew this man. It was the same as if they had come before the Court for

(Testimony of Clifford M. Cline.)

an order to have the examination, but he appeared voluntarily.

Mr. Bowen: My point was this. This authorization gave the Doctor permission to give the railroad any information he had.

The Court: Counsel says that he doesn't rely on this entirely, but that there was a voluntary appearance for examination and he relies on both.

Mr. Bowen: I will withdraw our objection. I think perhaps it takes it out of the rule.

As to the X rays we object to the introduction upon the ground that no sufficient or proper foundation is laid. The question was asked if they were made in the usual course of business. I think no proper found- [202] ation is laid.

The Court: I think you have to go further than that. The objection is well taken at this time.

By Mr. Anderson:

Q. Explain how these X rays were taken.

A. We have an X ray department in our office. The person is taken into this room and prepared for the picture. It is then taken to the X ray technician and developed by her and examined by me afterward.

Q. Do you know they are pictures of the person who went into the X ray room? A. Yes sir.

Q. Do you supervise the taking of the X rays?

A. Not the technique but I examine the pictures.

Q. Is that the ordinary manner of taking X rays? A. Yes sir.

(Testimony of Clifford M. Cline.)

Q. Do you say those are X rays taken of Mr. Stanger? A. Yes sir.

Q. Mr. Anderson: We now renew the offer of exhibits 4, 5, and 6, which are X rays taken of Mr. Stanger.

The Court: The objection is overruled, they may be admitted. Number 7 is also admitted.

Q. Now, Doctor, referring to exhibits 4, 5 and 6 which are X rays of Mr. Stanger, which you took. What part of the back do these X rays cover?

A. They cover the cervical and thoracic vertebra. [203]

Q. Near the bottom of the shoulder blade?

A. Yes sir.

Q. From these X rays do you find anything wrong with Mr. Stanger's back?

Mr. Bowen: Objected to as leading and suggestive, and calling for a conclusion of the witness.

The Court: Sustained.

Q. What do these X rays show concerning Mr. Stanger's back and spine?

A. The X ray pictures reveal no lesion or damage to the spine.

Q. Do they show any other injuries of any kind?

A. In my report, and I have looked at the pictures again, I find they are essentially negative.

Q. What do you mean by that?

A. I think they are negative.

Q. That they show nothing wrong?

A. That's right.

(Testimony of Clifford M. Cline.)

Q. You mean, Doctor, from the terms used, that essentially they fail to show anything wrong?

A. That's what I mean, yes.

Q. You did make an examination other than taking of the X rays, did you not?

A. Yes sir.

Q. As a net result of your entire examination what did you find concerning Mr. Stanger's back, as to whether it was injured or not? [204]

A. May I look at the report?

The Court: Report that you made at that time?

A. Yes sir.

The Court: Certainly.

A. Mr. Stanger complained of pain which has been persistent since the derailment on January 14, will get relief by going to chiropractor or using hot pad, or electric pad. Height 6 feet 1 inch, weight 180 pounds, eyes negative, upper plate, tonsils slightly embedded; throat negative; heart negative lungs negative, complaint, pain in back. No limitation of motion; abdomen, right scar appendectomy. No evidence of spinal curvature, spine essentially negative.

Q. Had his tonsils been removed?

A. No, they were slightly embedded.

Q. Did you discover any objective symptoms of injury?

A. No objective symptoms.

(Testimony of Clifford M. Cline.)

Q. What is the difference between subjective and objective symptoms?

A. Subjective symptoms, rather subjective is what the patient states, and objective are symptoms the physician finds.

Mr. Anderson: That's all, you may examine.

Cross Examination

By Mr. Bowen.

Q. Doctor, directing your attention to exhibit 4, you would say that is not a very good X ray would you not? [205]

A. I would say it is a very good picture. All those are.

Q. How much of the dorsal region of the spine does that show?

A. The segment below where that other is taken.

Q. How much of the dorsal does exhibit "4" show?

A. It is down to the 12th rib, to the bottom of the dorsal vertebra.

Q. From that exhibit "4" that doesn't disclose any abnormality or condition that may cause pain?

A. I can tell the Court my opinion of the pictures as a whole is that they are good, but any anterior posterior picture through the region of the heart never shows up clearly if you are shooting through the chest and ribs, then that picture is indistinct.

Q. And exhibit "4" is indistinct.

(Testimony of Clifford M. Cline.)

A. The dorsal is not distinct in this picture.

Q. Then Doctor, as to the condition the dorsal vertebra are in, if they do not appear you would be unable to say what the condition was?

A. Except from the lateral picture.

Q. Were you in the room when these were taken?

A. I wouldn't want to say that I was in the room. I may have been or may not have been. I don't stay all the time these pictures are taken.

Q. And you didn't find any objective symptoms. That is, in the examination you made?

A. No sir. [206]

Q. Did you find any subjective symptoms.

A. I found Mr. Stanger said to me that he had pain which was more or less persistent, and also a dull aching which was more or less continuous, and complained of tenderness and complained of pain around the dorsal vertebra.

Q. How many dorsal vertebra are there?

A. Twelve.

Q. And the cervical, how many are there?

A. Seven.

Q. How many of the cervical is shown in exhibit "4"? A. None in this picture.

Q. Did you actually feel Mr. Stanger's spine with your hand? A. I did.

Q. Did you elicit pain when you examined it?

A. He complained of tenderness there and soreness.

(Testimony of Clifford M. Cline.)

Q. You have to co-relate the two, the objective and the subjective symptoms. The X rays do not show pain?

A. No sir, but they do show the cause of pain.

Q. Do they always show the cause of pain?

A. Not necessarily.

Q. Isn't it true, Doctor, that you find pain and severe pain, and yet so far as your ability to feel that with your fingers or show it with an X ray, that would be impossible?

Mr. Anderson: Objected to on the ground that what are subjective and objective symptoms are defined, [207] and now he asks if a man, according to his experience, cannot have a painful condition or have pain which is not discernible objectively. That cannot be answered since he is not able to fathom the subjective symptoms. This witness says that he could not discover any pain or cause for pain.

The Court: He may answer.

A. I don't understand the question.

Q. The Court: You may reframe the question.

Q. Doctor, is it, in your opinion, as a professional man, possible for a patient to have a severe pain in the spine, the dorsal region of the spine, and you would be unable to see it, or discover it by feeling with your hands or by taking an X ray?

A. I think a person could have pain and be in the hands of any expert and it might be overlooked. I am inclined to believe with the experience that I

(Testimony of Clifford M. Cline.)

have had I am able generally to determine whether they have pain or not.

Q. May a patient have a pain, and a severe pain in the dorsal region, there being no objective symptoms?

Mr. Thompson: Objected on the ground that it involves the assumption that the Doctor knows that the person did have a pain.

The Court: The Doctor can explain his answer.

Q. Doctor Cline, may a patient have a pain, a severe pain [208] in the dorsal region and there be no objective symptoms?

Mr. Thompson: Objected to on the grounds last assigned.

The Court: He may answer and explain his answer.

A. I think it might be possible for a patient to have pain, yes, to actually have pain and the physician and surgeon may overlook it.

Q. Directing your attention to exhibit "5".

A. That is a lateral picture of the dorsal spine.

Q. When you say lateral, what do you mean?

A. From side to side.

Q. Do you know how he was lying at the time that was taken? A. Yes.

Q. How? A. On his side.

Q. Does that show the normal spine?

A. This picture shows a normal spine.

Q. Would you say it is a clear picture?

(Testimony of Clifford M. Cline.)

A. I would say it is a splendid picture for a lateral picture.

Q. Does it show a curvature?

A. No curvature at all, just as you get in a lateral picture.

Q. Now, as to exhibit "6" what do you say as to defendant's exhibit "6" show the dorsal vertebra?

A. This is a picture of the cervical and the thoracic or dorsal. The cervical is clear, very clear, and the [209] thoracic is as you always have it in these pictures.

Q. The dorsal is indistinct.

A. Just as they were in exhibit "4" as I explained the heart and ribs cover the picture in an anterior-posterior.

Q. And in exhibit "4" and exhibit "6" the dorsal vertebra are indistinct?

A. Yes sir.

Q. That is the region where Mr. Stanger complained of pain? A. Yes sir.

Q. Now, Doctor, isn't it true that while Mr. Stanger was at your office on the occasion you made this examination that you prescribed to him that he be put in a cast?

Mr. Thompson: I object to this on the ground that it appears that the only purpose for which this may submitted himself to the witness was for the purpose of a physical examination and not for the purpose of prescribing or treating the patient.

(Testimony of Clifford M. Cline.)

He has not been asked concerning any such matter on direct examination.

The Court: Would not that have some bearing on the condition of the plaintiff? Overruled.

Mr. Thompson: If Your Honor thinks it would have some bearing, I will withdraw the objection.

A. I might add that Mr. Stanger came back to my office at least twice, asking if I had some advice and he made the statement; "would a cast help me" and I said: "Sometimes a cast does help these backs." [210]

Q. Just answer my question, if at the time Mr. Stanger came and had the X rays made, exhibits 4, 5 and 6, you then made your examination, and at that time you and Mr. Stanger being present that you didn't say to Mr. Stanger and suggest to him that a plaster paris cast be applied to him?

A. I remember making no such statement.

Q. Would you say that you don't recall it, or that you didn't make it?

A. I didn't make it, I don't recall making it.

Q. But you may have made such a statement.

A. I question it very much.

A. If you made such a suggestion that of course, it was in your opinion necessary.

A. If I made such a statement after this examination, I considered if he took a complete rest he would get over his trouble.

Q. If you made such a statement on the take that you took the X rays that he be put in a cast

(Testimony of Clifford M. Cline.)

in the dorsal region, if you made that statement, you thought it was necessary.

A. It would be to give Mr. Stanger a rest.

Q. Will you answer the question?

A. I don't think I said it, and in the second place, you asked this question, if I said to put on a cast that I must have had a reason——

Q. I asked, Doctor, if you said it, then it was necessary in [211] your opinion?

A. Yes sir.

Q. Doctor, so that we might have the record clear, were you paid for making the examination?

A. Yes sir.

Q. And for taking the X rays?

A. I was, yes.

Q. Who paid you?

A. The Union Pacific Railroad Company.

Mr. Bowen: That is all.

Redirect Examination

By Mr. Anderson.

Q. State whether or not you are still of the opinion that these X rays are essentially negative?

A. I am.

Q. From the findings you made after making the examination will you state whether or not you are of the opinion that you made any such suggestion that he should be put in a cast?

A. I don't recall any such suggestion. I think it was made to me and not to the patient. Going

(Testimony of Clifford M. Cline.)

back eighteen months, I don't just recall.

Mr. Anderson: That is all, Doctor.

Mr. Bowen: That is all. [212]

DOCTOR HOYT B. WOOLEY

Being called as a witness on behalf of the defendant, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Thompson:

Q. State your name, age, place of residence.

A. Hoyt B. Wooley, age 38, Idaho Falls, Idaho.

Q. Occupation.

A. Physician and surgeon.

Q. Are you admitted to practice medicine in Idaho? A. Yes sir, I am.

Q. How long have you been so admitted?

A. About eight years.

Q. I wish you would state to the Court, your preparation and study and qualification prior to your being admitted, or at any time, to practice medicine.

A. I graduated from high school in 1920——

Q. —It is sufficient to begin with your medical school.

A. Graduated from Northwestern in 1933.

Q. With what degree?

(Testimony of Dr. Hoyt B. Wooley.)

A. A degree of M. D. I took fifteen months internship, twelve months in the Illinois Masonic Hospital from January 1932 to December,—it was the last of December 1933 and then three months in the L. D. S. hospital as resident physician at Idaho Falls prior to taking the [213] Idaho State Board, which I took in April and started to practice in May of 1934.

Q. Do you know Mrs. Stanger, one of the plaintiffs in this case? A. Yes sir.

Q. And what have been your contacts with Mrs. Stanger, from a professional point of view.

A. May I refer to my record?

Q. Yes, you may do that.

A. The first professional service that I rendered was on the 10th of November 1939. Now, do you wish me to state the circumstances under which it was given?

Q. Yes, and the history and all you have.

Mr. Bowen: Just a moment, may I ask the Doctor a question?

The Court: For the purpose of making an objection.

Mr. Bowen: Yes, Your Honor.

The Court: You may do so.

By Mr. Bowen:

Q. Mrs. Stanger came to you to be treated?

A. Yes sir.

Q. Did you treat her? A. Yes sir.

(Testimony of Dr. Hoyt B. Wooley.)

Q. Did she pay you? [214]

A. Yes sir.

Q. What is the first time you told the Union Pacific Railroad Company about this treatment?

A. I think I will have to refer to,—well, to the best of my knowledge that would be the 9th of August 1941.

Q. That was the first time that you told anyone connected with the Union Pacific Railroad Company, the defendants in this action, that you had treated Mrs. Stanger.

A. To the best of my knowledge.

Q. Do you think, Doctor, that it might be before that time?

A. I don't recall of any such conversation before that time.

A. Mr. Bowen: Now, Your Honor, we object to this evidence, it is privileged communication, and comes within the rule. A Railroad Doctor who treats a patient in 1941 tells the Railroad Company all about it and now wants to tell this Court about it.

Mr. Thompson: The Court will remember that Mrs. Stanger says that she has no objection to this Doctor testifying.

Witness: May I say something,—

The Court: Yes.

Witness: I was shown permission,—a slip giving me permission to testify, which was signed by Mr. Stanger, giving me permission to give this information to the Railroad Company.

(Testimony of Dr. Hoyt B. Wooley.)

Q. When was that? [215]

A. At the time as I gave you, August 9, as I recall it.

Q. Which slip was it you saw?

A. The only way I can answer was that it was a slip of paper authorizing me to give any information that I had to the person bearing that slip.

Q. Now, as to Mrs. Stanger, did she sign that slip of paper? A. No sir, she didn't.

Q. You know that she didn't sign it or send it to you. A. No she didn't sign it.

Q. You never got any authorization from Mrs. Stanger?

Mr. Thompson: I submit that this does not go to their objection.

The Court: The witness volunteered the information that permission was granted to him to give this information to the Company. He may answer.

A. I don't recall the exact wording of the slip of paper but to the best of my knowledge the substance was this: "To whom it may concern, this authorizes that you may give what information you have concerning Mrs. Stanger or myself."

The Court: Who signed that?

A. Signed by Mr. Stanger, the slip that I saw.

Q. Signed by Mr. Stanger?

A. That's right.

Mr. Bowen: I think that would come under [216] the same rule. Now, as to whether he can sign for Mrs. Stanger——

(Testimony of Dr. Hoyt B. Wooley.)

The Court: —He cannot.

The Court: Now, go ahead.

Mr. Thompson: But she waives as to this Doctor she has waived any privilege.

Mr. Bowen: I think that is correct.

The Court: Then there is no dispute that she says she would let this Doctor testify.

Mr. Bowen: Mrs. Stanger says that.

The Court: That seems to settle this. Now go ahead.

By Mr. Thompson:

Q. The history that was given by her to you, and all that followed, up to the time of your examination and prescribing medical care, at the conclusion of that, and following up to the time that you last saw her prior to this derailment.

A. On that date,—on the 10th of November 1939 my records show a history given me by Mrs. Stanger that she, for the past four years had been flowing from eight to ten days twice a month.

Q. Twice a month?

A. Yes sir,—that large clots, back ache, cramps in the groin before menses and during menses; fatigues easily; run down most of the time, and had been taking iron pre- [217] paration. The last menstrual period was October 28 to November 9th, and she said that the last five days was much darker than usual. The blood count at that time showed 42 per cent hemoglobin, and the course of treatment

(Testimony of Dr. Hoyt B. Wooley.)

instituted was an intermuscular injection of astrone 2 thousand units three times weekly. I also made up a preparation,—do you wish me to state?

Q. Yes.

A. Elixir of Ferrin oz. 4. Jecolein q s a d oz. 16 and the directions on such prescription was a desert spoon full three times daily, one half hour before meals.

Q. When did you last see her prior to January 1, 1940? A. January 1, 1940, you say.

Q. Yes, when was she last to your place of your office of you to her home?

A. The last time prior to that time was the 14th day of December 1939.

Q. Had you dismissed her as a patient?

A. That wasn't my understanding, no sir.

Q. What was your understanding at that time?

A. At that time Mrs. Stanger told me that she and her husband were leaving on a trip, and that when she returned she would be back.

Q. Did she ever come back? A. No sir.

Q. Did you at any time tell her that her condition had all [218] cleared up or had all cleared up in December 1939, or at any other time?

Mr. Bowen: Is this an impeaching question?

Mr. Thompson: No, she said that Doctor Wooley had treated her and we are asking about the treatment.

Mr. Bowen: We object to the question as no sufficient foundation is laid.

(Testimony of Dr. Hoyt B. Wooley.)

The Court: He may answer.

Q. No sir I don't recall making that statement.

Q. Do you say that you did or did not?

A. I would say that I didn't.

Q. You did not make such a statement to her.

A. I did not.

Q. What is the fact as to whether her condition had cleared up, and that she did not need further treatment, surgical or medical?

A. As I understand your question, if I had told her,—had made that statement to her I would be implying that the condition was cured. I don't think so, I didn't think so at any time.

Q. Have you examined the hospital chart and the record of her operation and the report of the analysis,—the pathological report made upon portions that were amputated?

A. No sir, I haven't.

Mr. Thompson: May we have that exhibit?

The Court: Mr. Bailiff, give counsel the exhibit.

[219]

Q. I show you defendant's exhibit "1" which is a hospital record of Mrs. Stanger, which covers the operation she had in July 1940, and the record preceding that, and I will ask you to examine it and express your opinion concerning her condition in December,—that is, say whether in your opinion her condition was cleared up and if not, what your opinion is.

(Testimony of Dr. Hoyt B. Wooley.)

Mr. Bowen: To which we object upon the ground that it is deciding, or rather asking the very question Your Honor has to decide, and on the ground that Mr. Thompson objected to our question of Doctor Lynn. It is the very question this Court is to decide in this suit.

The Court: He can testify as to his own treatment of the patient, but when he asks him to take the opinion of other people, but now, I think he is asking about this time that this Doctor was treating the patient and knows from his own knowledge, then of course, he can give that opinion. I think the way this question is framed that we are getting into deep water. I believe I will sustain the objection, as I read these decisions they are so broad that they hold that an expert witness cannot give an opinion upon a question assuming a state of facts which includes the examination or report of other physicians or other people.

Mr. Thompson: Does it deal with diseased parts [220] as this question does?

The Court: I think this question comes under the rule laid down. Objection sustained.

Mr. Thompson: May I save an exception?

The Court: Yes.

The Court: Did you make any findings, Doctor, in December 1939?

A. No, I didn't examine her, not on the 14th of December 1939.

(Testimony of Dr. Hoyt B. Wooley.)

Q. From the history she gave and out of that pathological report which is based upon definite material.

The Court: Now, he did make some findings, I understand, at least, up to that time, he had made an examination and treated her up to that time, to December.

Q. I will limit to the portion of the hospital record consisting of the pathological report.

Mr. Witty: But that is the report made by another.

A. May I say this, the pathological report may be interpreted by any physician. It is simply a pathological report and does not involve someone's opinion other than the pathologists opinion of the diseased parts. I imagine Mr. Thompson wishes to connect the pathological report with my findings when I examined her.

The Court: Yes, maybe that would not come [221] under the rule. He is basing his answer upon that report and comparing is as to his findings. He is not giving an opinion on the report of their opinion, he is now interpreting the pathological report and comparing it with his, and then giving us the result.

Q. I want your opinion based upon the history you had and your examination and treatment of Mrs. Stanger up to the time you last saw her in December, based upon that, plus the pathological report you had.

(Testimony of Dr. Hoyt B. Wooley.)

Mr. Bowen: To the extent that it is based upon the pathological report we object upon the ground that the exhibit is in evidence, a part of which can be deciphered, and this invades the province of the Court and seeks to decide the question this Court must decide.

Mr. Thompson: The opinion I seek is whether her condition was cleared up on December 14, 1939, or what her condition was at that time, in your opinion.

The Court: Overruled.

A. The interpretation of this pathological report as it fits in with my findings at the time of the examination of Mrs. Stanger.

Mr. Witty: Did you make any findings on December 14, 1939?

Mr. Thompson: We object to two counsel examining a witness. [222]

The Court: Yes, we have a rule on that. I think, too, that he said he didn't make any findings on that date.

A. The pathological diagnosis by Doctor Daines of tissue from the uterus, cervical tissue. Fibrosis uteri with diffuse endometrial hyperplasia. Chronic fibrous cervicitis. Multiple follicular cysts of the ovary with corpus hemorrhagicum. The diagnosis is fibrosis uteri with diffuse endometrial hyperplasia, which could be ascribed to the history Mrs. Stanger gave me at the time of my examination.

(Testimony of Dr. Hoyt B. Wooley.)

Q. Taking the physical facts into account that you have just read from that report and the examination that you made and the history that Mrs. Stanger gave to you I will ask you whether you are of the opinion that Mrs. Stanger was cured of the illness that she came to you with, and described to you. If she was cured of that on December 14, 1939?

Mr. Bowen: Objected to as calling for a conclusion of the witness. I object on the ground and for the further reason that it invades the province of this Court.

The Court: Overruled.

A. I would say she was not cured.

Q. What are the physical ailments, particularly directing your attention to that pathological report, what are [223] the physical ailments of the organs normally or naturally associated with the history she gave you?

A. Excessive menstruation.

Q. That comes from what? What may it come from? May it come from any of those things that you have read?

A. Yes sir.

Q. Explain to the Court the disorder that female organs such as we have been dealing with,—what sort of disorders bring about the condition she had when she came to you?

A. The condition of the uterus which was fibrous was a condition that occurs over a period of time,

(Testimony of Dr. Hoyt B. Wooley.)

and is of a chronic nature. Hyperplasia endometrial is a condition in which the lining of the uterus which normally is sloughed off at each menstruation is much thicker than normal, because of the increase in size and thickness, the increase in vascularity causes the flow to be continued and causes, or because of the replacement of muscle tissue by fibrous tissue does not permit the uterus to contract, thus bringing about a continuation of the flowing.

Q. What are the things that a physician does to correct such a condition or situation of continuous flowing, surgically, that she described to you?

A. When you put the question, surgically, the only thing you can do is remove the uterus. [224]

Q. Then if,—I will *be* this in the inquiry to assure myself. If there is a fibrous uterus such as is described in the pathological report, what are the symptoms or manifestations of it?

A. Excessive flowing.

Q. What are the symptoms or manifestations of cystic ovaries, say multiple cystic ovary.

A. There is no connection between cystic ovary and the excessive flowing.

Q. That would be caused exclusively from the fibrous uterus? A. Yes sir.

Q. Would there be any reason, in surgery, why, operating for fibrous uterus, one should so operate as to interfere with the blood supply to the right ovary and not interfere with the blood supply to the other,—assuming one was affected by multiple

(Testimony of Dr. Hoyt B. Wooley.)

cysts, is there any reason one should, in operating, interfere with the blood supply to the bad ovary and not interfere with the blood supply to the good one?

A. I don't understand the question.

Q. In skilfull surgery,—in normal skilfull surgery on the uterus, for fibrous uterus, ought the operation interfere with or cut off the blood supply to either ovary? A. No sir.

Q. Is there any reason why it should cut off the blood supply to one more than the other, if it cuts off the [225] blood supply at all. If it is skillfully performed? A. I would say no.

Q. Have you stated what chronic fibrous cervicitis is? A. I don't think so.

Q. What is it?

A. Chronic fibrous cervicitis is a condition very similar to the fibrous condition you have in the uterus only it exists in the cervix or the mouth of the uterus, it is a condition of the replacement of normal cervical tissue with fibrous tissue.

Q. What does chronic mean, applied to that?

A. A condition lasting over a period of time.

Q. What do you mean by "over a period of time"?

A. I would say months or possibly a year.

Q. Suppose a patient comes in who has a flowing condition such as Mrs. Stanger described to you and pathological report shows fibrosis uteri and chronic fibrous cervicitis, what is your opinion now, do you say was the cause of that excessive flowing?

(Testimony of Dr. Hoyt B. Wooley.)

A. The fibrous condition of the uterus and hyperplastic condition of the endometrium.

Q. Let us suppose that a person of the history which Mrs. Stanger gave you, but we are not supposing Mrs. Stanger, and such observations as you say you made of Mrs. Stanger and her condition as you saw her on Decem- [226] ber 14, 1939, and let us suppose that person, or such person rides from Idaho Falls to Denver and is seated in a Pullman car, facing forward and there is a derailment, and there is a table such as there are in Pullman cars, fastened into the side of the car between seats, the seats facing forward and backward; that there is a derailment and that person is thrown forward so that a portion of her abdomen corresponding with the table is thrown against the table, but with no rupture or evidence of discoloration or physical injury to the abdomen; that the person is assisted from the car which comes to rest partially upon the grade and partially off, and in a tilted but still in an upright position and such person goes between thirty and forty miles in to Denver,—is assisted to an automobile and rides in an automobile to Denver and there is treated for some abrasion to one of her lower limbs but does not affect her in getting about; that she has lunch with friends; that she goes, in the afternoon, to a horse show; that she then goes to a banquet of some sort; that she then

(Testimony of Dr. Hoyt B. Wooley.)

takes the train for Houston, Texas, spends a couple of days there and goes to Mexico City where she goes sightseeing for a period of four or five days, using an automobile to go about to the various places, she goes from there to Los Angeles and from Los Angeles to Idaho Falls and [227] then goes to her home. Getting back to Idaho Falls at the end of about thirty days, the 29th or 30th of January, she doesn't consult a physician until February 12, but remains at home, and subsequently, with her physician not testifying or stating, or she either,—that she had any treatment in the interim,—she is operated for that which corresponds to that shown in the pathological report. I will ask you whether in your opinion, the condition disclosed by the pathological report was, or a portion was caused by the derailment.

Mr. Bowen: To which we object upon the ground that the question doesn't contain all the facts or a substantial statement of the facts in this case and is misleading as to other facts as stated and upon the further ground that it invades the province of the Court and seeks to decide the very question in controversy here.

Mr. Thompson: The rule requires counsel to call attention to any misstatement or omissions of the facts. If counsel will do that I will gladly include any facts omitted.

Mr. Witty: If that is the rule.

(Testimony of Dr. Hoyt B. Wooley.)

The Court: Then suppose you do that.

Mr. Witty: Counsel failed to state in his question to the witness that immediately following the [228] accident that Mrs. Stanger began to flow excessively and that the condition has persisted from that time on. He failed to state that the plaintiff Mrs. Stanger was in an exceedingly nervous condition; that she was unable to get any sleep from Denver to Houston. It was an overstatement to say that they were in Mexico City four or five days. I don't recall that they went to a banquet in the afternoon of this accident. Those are some of the vital statements of fact occurring in the testimony and not in the question.

Mr. Thompson: They went to the athletic club to dinner. I will modify the question in that.

Mr. Witty: Further he fails to state that the record shows that prior to the trip she had entirely cleared up from flowing and that she considered herself in perfect health and never considered her health better; that she had for three months been in perfect health.

Mr. Thompson: And I supplement the question with the fact that prior to the trip the patient said that she had just completed menstruation, and to balance against that, your personal observation and history and other things embraced in the question, the statement of the witness, I do not assume it to be a fact but that the witness stated that immediately following [229] the derailment she proceed-

(Testimony of Dr. Hoyt B. Wooley.)

ed to menstruate profusely and flowed profusely. I do not think I can assume facts with reference to the extent or the duration of the abnormal menstruation thereafter.

Mr. Bowen: Now we object further to counsel's last statement. He is asking again that this witness decide what this Court has to decide and asking the witness to weigh the evidence.

The Court: Objection sustained.

Mr. Thompson: And I may have an exception?

The Court: Yes.

Q. Doctor, taking a patient such as the one we have been discussing and considering the operation, the nature of which you have a pathological report of—no, I think that is all, you may take the witness.

Cross Examination

By Mr. Bowen:

Q. You didn't tell us whether you are on the staff of the railroad physicians. A. I am.

Q. How long have you been on that staff?

A. Since August 1938.

Q. You were a member of the Union Pacific staff when Mrs. Stanger first came to you?

A. I was.

Q. And still are? [230] A. I am.

Q. Were you subpoenaed down here to testify?

A. I wasn't given a subpoena. I was given a message.

(Testimony of Dr. Hoyt B. Wooley.)

Q. You just came on your own accord.

A. No sir, Doctor Cline gave me a message to be here.

Q. You came at the request of Doctor Cline.

A. Doctor Cline was requested to be here, by, well, I don't know by whom.

Q. You came down at the request of Doctor Cline.

Mr. Thompson: I will say that I requested Doctor Cline to request him to be here.

Q. Who requested you to come to testify?

A. I will have to put it this way, when I was making the rounds of the hospital there was a note there to see Doctor Cline. I did and upon having a conversation with Doctor Cline, which was in effect this, that Mr. Thompson's office had asked him to convey to me the request that I be down here with Doctor Cline, as a witness.

Q. Now, Doctor, I think you stated that the first information you gave the Railroad Company about Mrs. Stanger was in August of this year.

A. I think that is right.

Q. That wasn't in August of last year 1940 was it?

A. No.

The Court: We will take a recess for ten minutes. [231]

(Testimony of Dr. Hoyt B. Wooley.)

4:10 o'clock P.M. October 21, 1941

Q. I think that you stated that you had been practicing for eight years.

A. About eight years.

Q. I think in answer to one of counsel's questions you stated that in all cases where women had fibrous uterus there is excessive flowing.

A. That of course, would depend upon the degree of fibrosis.

Q. Did you take that into consideration when you answered counsel's question?

A. As I understood it, it was in reference to this particular condition. I didn't interpret the question to mean a general condition.

Q. What did you mean.

A. With reference to fibrosis uteri with hyperplasia endometrium, you would have excessive flowing.

Q. In all cases? A. Yes sir.

Q. Now, when did you make any examination, physical examination of Mrs. Stanger, not just by asking questions,—if you did.

A. I did on the 10 of November 1939.

Q. Tell us what you did.

A. I checked Mrs. Stanger as to her physical condition, excluding a pelvic examination. Mrs. Stanger had been [232] flowing from the 28th of October until the day before she came to my office and under the circumstances I would not be,—that

(Testimony of Dr. Hoyt B. Wooley.)

is, I didn't think it would be advisable for me to make a pelvic examination.

A. Did you ever make a pelvic examination of Mrs. Stanger? A. No sir, I did not.

Q. Did you see the portion of the uteri that was removed? A. I did not.

Q. All you know of the uterus being fibrous is what someone else told you?

A. What I read.

Q. From what you read and someone told you is the only basis you had for saying this uterus was fibrous. A. No sir, it is not.

Q. I want to know what else you had.

A. On the history of excessive flowing. It is a history of fibrosis uteri and hyperplastic endometrium.

Q. There is no other cause that causes excessive flowing except fibrous uterus.

A. No sir, that is not correct.

Q. How many other conditions?

A. How many others.

Q. Yes, how many other conditions are there?

A. Incomplete abortion, glandular infection——

Q. Would nervousness, run down and weakened condition [233] cause that.

A. Not to bring about the condition over a period of time as this condition.

Q. I am asking generally, a person who was run down and nervous, a high nervous tension, would it contribute to excessive flowing?

(Testimony of Dr. Hoyt B. Wooley.)

A. It might be a contributing cause, yes.

Q. You said that Mrs. Stanger said that she had been flowing for the past four years from eight to ten days twice a month.

A. Yes sir.

Q. Who was present when she made that statement to you?

A. Who was present.

Q. Yes.

A. Mrs. Stanger and myself.

Q. If Mrs. Stanger had had a child in the interim of that four years would that make any difference in your opinion Doctor.

A. Certainly in that during pregnancy the flow stops.

Q. That would be true of Mrs. Stanger?

A. Yes sir, with anybody that would be true.

Q. You know Mrs. Stanger has a baby about a year old?

A. Yes sir, I did.

Q. And you still think, in view of that, that she told you that for the past four years she had flowed eight to ten [234] days twice a month.

A. Yes, but you would have to interpret that to be during the period that pregnancy was not present.

Q. Did Mrs. Stanger tell you what you said,—tell us what she said as to during the past four years that she flowed from eight to ten days twice a month?

A. That is the information she gave me.

Q. You knew at the time that she had had a baby during that time?

A. Naturally.

(Testimony of Dr. Hoyt B. Wooley.)

Q. Did Mrs. Stanger say that she had flowed excessively or that the period of time over which she flowed was greater than usual.

A. I would have to answer that question this way. That she said that she had large clots which could be significant of excessive flow. Speaking of excessive in relation of normal flow, and that the time element would have reference to prolonged flowing.

Q. Rather than to amount?

A. I think the amount as I have said, is covered by the large clots.

Q. When did you prepare the record you have been refreshing your mind from in Court?

A. It was prepared the day Mrs. Stanger was in the office.

A. You prepared that yourself?

A. Yes sir. [235]

Q. The first time that you say Mrs. Stanger was November 10 1939?

A. Yes sir, in regard to this condition.

Q. The last time that you say her was December 14, 1939?

A. That is right.

Q. How many times did she come to see you during that thirty day period?

A. I don't have my record of the visits that Mrs. Stanger made, with me. It is a matter of record at the office. The only record I have on this card, are two other times the 23rd of November and the 14th

(Testimony of Dr. Hoyt B. Wooley.)

of December, I checked the hemoglobin at those times and so it is on this card as a progress note.

Q. Isn't it a fact that you gave Mrs. Stanger what you call shots? A. That's right.

Q. Didn't they have the desired effect that you intended them to have?

A. Yes sir, I think they had a beneficial effect.

Q. You know they did? A. Yes sir.

Q. She responded to that type of treatment which you gave? A. Yes sir.

Q. Isn't it true when you last saw her that this flowing had entirely cleared up? [236]

A. I think that's right.

Q. Isn't it a fact that Mrs. Stanger told you she was feeling fine and was going away on this trip and that you told her it was all right.

A. I do think she was feeling much better.

Q. And had responded to your treatment?

A. Yes sir.

Q. And wouldn't you expect that to continue had there not been some intervening cause?

A. That question I would base my answer on other experience and other case histories.

Q. She responded as an ordinary woman to the type of treatment you gave?

A. She responded well to the treatment I gave for the condition.

Q. Your treatment stopped this excessive flowing? A. Yes sir.

(Testimony of Dr. Hoyt B. Wooley.)

Q. It had cleared up by December 14th?

A. She didn't have any flow on December 14th.

Q. Had cleared up and she was building up physically?

A. That's right.

Q. If that is true would you not have expected her to continue to build up had not something else came along?

A. I will have to answer that by saying that only upon my knowledge and experience with other cases similar can I answer. [237]

Q. You cannot answer that yes or no?

A. I cannot answer it yes or not. I don't know what the response would be from there on.

Q. What had been your experience with women who had responded to your treatment so readily in the past?

A. Similar cases.

Q. Yes, that is what I mean.

A. The only way I can answer that question is the fact that you may give this medication to patients and they respond for varying periods of time, and then there comes a time when they don't respond, that is, you don't get any response to the treatment.

Q. Where you give the treatment and get the desired results, you give the treatment to procure that result,—that is the purpose of the treatment?

A. Yes sir.

Q. So that we will have this straight Doctor, you never did give Mrs. Stanger a pelvic examination, at any time?

A. That is right.

(Testimony of Dr. Hoyt B. Wooley.)

Q. You never did examine the portion of the female organs that were removed?

A. I did not.

Q. Do you know whether during the time you treated Mrs. Stanger she gained in weight?

A. As to that I cannot say. [238]

Q. Did you take her hemoglobin count for December and November? A. Yes sir.

Q. Did she show improvement in that regard in December? A. Yes sir.

Q. How much?

A. In December,—the 14th of December 68 per cent.

Q. That would be an improvement, it was down to 42? A. To 42, yes sir.

Q. That would be an improvement in that difference? A. Yes sir.

Q. Isn't that a fast response to that treatment that you were giving, over a thirty day period?

A. No, I wouldn't say so.

Q. You would say it was normal?

A. I would say it was a good response.

Q. An average response? A. Yes sir.

Q. If you continued to treat her, in your opinion,—you would have intended to effect a complete cure, would you Doctor?

A. I don't understand that question.

Q. You don't want to say that she was completely cured on December 14, 1939?

(Testimony of Dr. Hoyt B. Wooley.)

A. She was not cured on December 14, 1939, so far as I [239] am concerned.

Q. Basing your answer on the improvement during that length of time, what length of time would it take to build her back to normal?

Mr. Thompson: Objected to as incompetent irrelevant and immaterial unless it assumes matters within the knowledge of the Doctor at the time he gave her the treatments.

Q. Basing your Answer upon the response that you recognized in Mrs. Stanger during the thirty day period and the treatment that you gave her, how much time would it take to effect a complete cure of that condition?

Mr. Thompson: Objected to as based on facts insufficient unless he says basing your answer upon the history that you received, that is, of flowing for eight to ten days over a period of four years and so forth, except during the time she was pregnant.

The Court: Overruled.

A. I cannot answer that question. I don't think it would be humanly possible to answer that.

Q. Now, Doctor Wooley, I understood you to say that excessive menstruation comes only from causes shown in the pathological report that you examined, is that correct?

A. No I will not say that, I think I later modified that.

Q. Isn't it true that excessive flowing comes from legion of causes? [240]

A. Yes.

(Testimony of Dr. Hoyt B. Wooley.)

Q. And the condition that you found in the pathological report are few of the causes?

A. One of the causes.

Q. There are literally hundreds of those?

A. Not that number.

Q. Well, a great many things that cause excessive flowing?

A. No, professionally I would not say a great many.

Q. How many are there?

A. I don't know.

Q. Are you acquainted with Doctor Hatch?

A. Yes sir.

Q. If Doctor Hatch testified that the causes are legion, would you care to agree with that statement?

Mr. Thompson: Objected to as improper cross-examination.

The Court: Yes, sustained. We do not allow a comparison of testimony.

Mr. Bowen: I appreciate the accuracy of Your Honor's ruling.

Q. Then Doctor, your statement or testimony that Mrs. Stanger had fibrous uterus is not based upon any personal knowledge that you have.

A. Yes, it is based upon the fact that I had a history.

Q. Nothing else, just the history? [241]

A. That's right.

Q. Has it been your experience that frequently a patient comes to you who describes certain symp-

(Testimony of Dr. Hoyt B. Wooley.)

toms and you find their actual trouble something else, or coming from some other cause.

A. Sometimes there are outward manifestations of a condition, when you say that come from some other cause, I don't quite understand that.

Q. Other than what the patient tells you?

A. We don't make a diagnosis on the patient's diagnosis.

Q. Then you do not make the diagnosis on what the patient tells you? A. Certainly.

Q. Well, which is it?

A. We make the diagnosis on the patient's history but not on the patient's diagnosis. We make it on the history together with the physical findings.

Q. Doctor, during the time you treated Mrs. Stanger did you have occasion, or did you ever suggest to her that she have an operation to remove the uterus to effect this cure?

A. I don't recall saying that.

Q. You didn't think that was necessary after she responded to the treatment that you gave her.

A. I didn't have time to make any decision in the case. [242]

Q. When Mrs. Stanger stopped coming to you, I think you said that you intended that she would come back again.

A. That was my understanding when she left.

Mr. Bowen: That's all.

(Testimony of Dr. Hoyt B. Wooley.)

Redirect Examination

By Mr. Thompson.

Q. During this time,—strike that—considering the case history and the pathological report what is your opinion as to the cause of Mrs. Stanger's excessive flowing?

A. Fibrosis of the uterus with hyperplastic endometrium.

Q. As of the time you were treating her?

A. That's right.

Mr. Thompson: That is all.

Recross Examination

By Mr. Bowen.

Q. Doctor, does a condition such as you found in Mrs. Stanger clear up by treatment such as you were giving her?

Q. What do you mean by clear up.

Q. You have expressed the opinion as to the cause of the flowing.

A. Yes sir.

Q. Keeping that in mind, tell me whether conditions such as that clear up with the treatment you gave, or is it [243] necessary to have an operation?

A. I will answer this question this way: There are no two responses alike, that is, identical. One may respond one way and another another way. Under the circumstances one certainly would not have been within good medical practice to have done other than try to build the person up generally when the hemoglobin is 42, they would not have been

(Testimony of Dr. Hoyt B. Wooley.)

doing other than practicing good medicine by trying to stop the condition which was drawing the patient down. Now whether the treatment that I gave would have been of such a prolonged effect as to bring about a clearing up of the condition so that she would not have had to resort to surgery I cannot answer because I didn't have an opportunity to continue the treatment, but it had been my experience that these cases respond differently, but ultimately to effect a complete cure, surgery is necessary.

Q. In all cases.

A. Of this particular condition of fibrous uterus and hyperplasia, if you want to use the word cure.

Q. To effect a stopping of the excessive flowing it is necessary to remove the uterus.

A. To stop excessive flowing?

Q. Yes.

A. That depends on the response of the individual patient, [244] if you cannot stop the flowing, or if it goes along for such a period,—a continued period and you cannot stop it then there is nothing but surgery to resort to. That depends on the individual and also on individual ideas, there are a lot of people who would rather put up with one thing, or one condition, and a lot that would rather have it done and get it over with immediately. You are dealing with individuals and specific conditions. All individuals don't respond the same.

Q. Can you answer this question, Will you say that in order to stop excessive flowing where the

(Testimony of Dr. Hoyt B. Wooley.)

uterus has become fibrous that an operation is always necessary?

Mr. Thompson: I object to that, he has answered the question before.

The Court: Yes, we are repeating now.

Mr. Bowen: That is all.

Mr. Thompson: That is all.

W. W. BROTHERS

Called as a witness on behalf of the defendant after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Anderson.

Q. State your name please Doctor.

A. W. W. Brothers.

Q. You reside at Pocatello? A. Yes sir.

[245]

Q. Your profession is what?

A. Physician and surgeon.

Q. How long have you been practicing in Pocatello? A. Since November 1919.

Q. Are you licensed to practice in the State of Idaho, as a physician and surgeon?

A. Yes sir.

Q. What school are you a graduate of?

A. Northwestern.

Q. Have you taken any post graduate work since graduation? A. Yes sir.

(Testimony of W. W. Brothers.)

Q. What is the nature of your practice, Doctor?

A. Mostly surgery, and surgical diseased, of women particularly.

Q. Have you been a physician in the Army?

A. Yes sir.

Q. And for what period of time?

A. Two years and one month.

Q. Did you examine Mr. A. G. Stanger at Idaho Falls about October 9, or 10?

A. Yes sir, October 9.

Q. Will you state, please, what that examination consisted of?

A. Consisted of taking a history of this accident in January, it occurred on January 19th, I believe it was, near Denver, and in examining his back and a general examination, but of his back in particular.

[246]

Q. How did you make that general examination?

A. I made it in the Hospital at Idaho Falls. The L D S hospital. I had him take off his shirt. I inspected his eyes, mouth teeth, throat and so on, his heart and chest and an examination of the spine. I had him move in different directions and tested his reflexes.

Q. What did you,—did you also examine some X rays taken by Doctor Cline?

A. Yes sir.

Q. I show you exhibits 4, 5 and 6. Are those the X rays that you examined?

A. Yes, they are.

(Testimony of W. W. Brothers.)

Q. After examining these X-rays together with your physical examination did you find anything, objectively, wrong with Mr. Stanger's back?

A. No sir, I couldn't.

Q. Was Doctor Hatch present when you made the examination? A. Yes sir.

Q. Also when you made an examination of Mrs. Stanger? A. Yes sir.

Q. Did you find that his tonsils had been removed? A. Yes sir.

Q. Why do you,—why are tonsils removed?

A. Ordinarily because of infection in the tonsils or chronic inflammation of the tonsils. [247]

Q. What effect does such a condition of the tonsils have on a person.

A. Well, commonly they cause a rheumatic condition, pain, neuritis.

Q. Had he complained of pain anywhere?

A. He complained of pain in his spine in the region of the eighth dorsal vertebra, in the muscles.

Q. Is that about the bottom of the shoulder blade?

A. About on the level with the lower angle of the scapula or shoulder blade.

Q. At the time you examined Mrs. Stanger state what that examination consisted of, including the history she gave you of her condition.

A. Mrs. Stanger's history of the case as related by Mrs. Stanger was briefly, she said she first began excessive menstruation following the birth of the

(Testimony of W. W. Brothers.)

last baby two years ago, that she had been treated with hypodermic injections with some improvement; was feeling some better when she went on this trip. At the time of the accident she was playing bridge when the car stopped suddenly and she was thrown suddenly against the edge of the table injuring her abdomen. This made her extremely nervous and caused her to flow more, coming on immediately after the accident. She said that she flowed four or five days at a time and was never free from some bloody discharge more than three or four days at a time. She reported to [248] Doctor Hatch for treatment on February 12. She was given treatment and finally decided to operate. She was given three blood transfusions and operated in July, I think July 9, 1940. The operation was conization of cervix with removal of the ovary, the left I think, and she made a good recovery and has been gaining since that time. The present examination shows her to be a slender woman quite intelligent, pulse regular, teeth good condition, tonsils good, no apparent infection of the larynx; no murmurs, blood pressure 118/80, Abdomen, old scar right rectus in good condition, new scar slightly to the right of umbilicus, no abdominal tenderness, no masses felt. The examination showed the surface to be smooth well healed, nothing abnormal; the reflexes were normal no edema or swelling.

Q. The scar slightly to the right of the midline of the umbilicus was that a recent operation?

(Testimony of W. W. Brothers.)

A. Yes sir.

Q. From your examination which you did at that time, what had she been operated for in July 1940, do you know.

A. Yes, I read the pathological report of the tissue removed and I also talked to Doctor Hatch and that, together with the history formed my impression of the condition.

Q. Can you say from your complete examination, what impression did you form as to the cause of Mrs. Stanger's condition? [249]

Mr. Bowen: Objected to as incompetent, irrelevant and immaterial.

The Court: Overruled.

A. My impression of her condition was that she had been suffering for sometime from fibrosis of the uterus, chronic cervicitis, inflammation of the cervix and hyperplasia of the endometrium. This condition was improved somewhat but got worse but after her operation she was improved, satisfactorily improved.

Q. What are the symptoms of those things,—fibrous uterus, or fibrosis uteri?

A. The main symptom is excessive menstruation following by anemia, all the symptoms of anemia, such as nervousness and weakness.

Q. What is anemia, how is anemia *connection* with her condition for which she was operated?

A. Anemia is secondary to her loss of blood. She lost too much blood. More than she could replenish.

Q. How does that effect the hemoglobin test?

(Testimony of W. W. Brothers.)

A. Causes a lowering of percentage of hemoglobin.

Q. And when the flow stops for a time does the hemoglobin rise? A. Slowly rises, yes sir.

Q. What Doctor, in your opinion, is the usual cure for fibrosis uteri and the other conditions to which you referred? [250]

A. There are several different forms of treatment. Treatment with injections which are not so satisfactory but might give temporary relief, and small doses of radium which is quite effective and X-ray treatment and surgical treatment such as was done in this case.

Q. In this treatment or treatments, state whether or not the giving of this treatment would result in sterility?

A. The treatment by hypodermic injection would not. The X-ray or radium would possibly cause temporary sterility and the surgical treatment, of course, would cause sterility. The X-ray treatment does not cause permanent sterility, they don't use it to that extent.

Q. The operation which was performed did result in sterility? A. Yes sir.

Q. When is an operation performed, as distinguished from other treatment, Doctor?

A. Usually one prefers to use X-ray or radium, that is, child bearing age. If a person is near the menopause then it doesn't make so much difference and is usually preferable.

(Testimony of W. W. Brothers.)

Q. Is there any connection, or relation between fibrous uterus and the menopause under any condition?

A. Fibrosis as a rule gets worse as a patient gets older up toward the menopause.

Q. Assuming the history that Mrs. Stanger gave you about [251] excessive menstruation following the birth of her last baby, approximately two years ago. What is your opinion as to what that condition was, or what it was leading up to. Did that have any connection with the fibrosis uteri?

A. Yes, I think it did.

Q. To what do you attribute the excessive flowing that she was experiencing?

A. Hyperplasia of the endometrium and fibrosis of the uterus.

Q. Is it your opinion from your examination and history that you received that the operation such as Doctor Hatch performed would ultimately be necessary?

A. Yes, I think it would.

Mr. Anderson: That is all.

Cross Examination

By Mr. Bowen.

Q. Would you still answer that, that you think it would, if this woman had been your client,—your patient and you had been treating her and she had been responding to other treatment, would your answer to this be the same?

(Testimony of W. W. Brothers.)

A. Not if she was getting well, I would not advise an operation, no.

Q. If Mrs. Stanger had been treated by some other treatment by the giving of shots, and if she had responded, and her hemoglobin had built up from 42 to 68 over a period of thirty days would you expect a cure from that treatment? [252]

A. I would not expect a cure.

Q. Would you expect a correction of the excessive flowing?

A. I think she could have been relieved.

Q. Excessive flowing could have been corrected if that treatment had been continued?

A. It is necessary to keep up that treatment.

Q. Did you testify that you always find excessive flowing where the uterus has become fibrous, is that always the case?

A. Not always but usually.

Q. Is it the average case?

A. Usually they do have excessive flowing.

Q. Is that more likely as the uterus may become fibrous?

A. Yes sir.

Q. You are on the medical staff of the Union Pacific Railroad Company?

A. Yes sir.

Q. Have been for a good many years?

A. Yes sir.

Q. I think you stated that Mrs. Stanger told you she was riding in the car and playing bridge when the car suddenly stopped?

A. Yes sir.

(Testimony of W. W. Brothers.)

Q. She didn't say anything about the car being wrecked?

A. Yes, I understood that was the case.

Q. I was wondering what she said to you, that she was in a [253] wreck or the car suddenly stopped.

A. I don't remember just exactly what she said except that she was playing bridge.

Q. Did she tell you that she was thrown forward and struck her abdomen across the edge of the card table?

A. Yes sir.

Q. Now, referring to Mr. Stanger, when an infection or trouble in the system is being caused by or from infected tonsils I think you stated that frequently happens?

A. Yes, it does.

Q. When the tonsils are removed do you expect that condition to clear up?

A. You usually do, yes.

Q. Where the trouble is coming from the tonsils?

A. Yes, sir, not always, but usually.

Q. How soon do you note improvement where the infected tonsil is causing the trouble?

A. In the course of a few weeks.

Q. Shortly it starts to clear up?

A. Usually.

Q. If pain and discomfort continue that you naturally assume that the trouble was not coming from the tonsil?

A. Not necessarily, they are not always relieved by the removal of the focus of the infection.

(Testimony of W. W. Brothers.)

Q. If you remove the focus of the infection you would expect to be relieved from discomfort that it was causing? [254]

A. Not always.

Q. Is that the general rule?

A. Yes, usually they are.

A. You stated that in your examination of Mr. Stanger you found no objective symptoms that could cause pain and discomfort?

A. That's right.

Q. Were there present any subjective symptoms?

A. Yes, he said he had pain and tenderness in the muscles on either side of the eighth dorsal vertebra.

Q. Did you run your hand down the spine or make any examination?

A. Yes sir.

Q. Did he wince or give evidence of pain?

A. Not particularly he said it was tender in those spots.

Q. Referring to exhibits 4, 5 and 6, isn't it true that those exhibits are what you would call poor X-rays of the dorsal region?

A. No, I think they are fairly good pictures.

Q. Could you look at exhibits 4 and 6 and determine from them, or would you want to base a diagnosis on exhibits 4 and 6, that there was an injury in the region of the dorsal vertebra?

A. I think one could be rather safe in saying that there was no injury, no fracture.

Q. You would not want to say from those ex-

(Testimony of W. W. Brothers.)

hibits that there [255] could not be a thickening or thinning of the intervertebral disc.

A. You can't see those discs.

Q. You can see the space? A. Yes sir.

Q. If there was a thickening or thinning they should show up?

A. You would know that by the difference in the space between the vertebra.

Q. Are those pictures clear enough to determine that? A. Yes, sir, I think so.

Q. Examine this as to the eighth dorsal.

A. This spine is hidden by the heart shadow.

Q. Now, look at number 4.

A. The same is true in that case.

Q. You would be unable to state from either of those whether there was an injury to the vertebra in that region?

A. I would not expect to make a diagnosis from an anterior to posterior picture.

Q. You can tell from, or can you, from looking at this X-ray whether there is an injury to the dorsal vertebra? A. No sir.

Q. In fact X-rays don't show pain?

A. No, they don't.

Q. Is it true that subjective symptoms may be,—that a pain caused or discomfort caused, and that you classify as under subjective symptoms may be just as serious as [256] if the symptoms were objective? A. I don't quite understand that.

(Testimony of W. W. Brothers.)

Q. Isn't it true that you may have an injury just as serious which may be only indicated by subjective symptoms as an injury that may be indicated by objective symptoms?

Mr. Thompson: Objected to as it assumes that subjective symptoms can be determined by the physician, and the contrary is in the record.

The Court: Can you answer that Doctor?

A. In a way, I can. Subjective symptoms should be backed up by objective findings. Subjective symptoms are what the patient tells you, of course, when they have a pain for instance in the heart condition, then one can find objective reasons for that pain. It may be a serious condition.

Q. It is just as serious as though the symptoms were objective?

A. You don't speak of symptoms as being objective. You speak of objective findings.

Q. I was using the word that counsel used. Do you know when Mr. Stanger had his tonsils out?

A. No sir, I think he said something about Doctor Hatch taking them out.

Q. You looked in his throat? A. Yes sir.

Q. Was it a good job of removing tonsils? [257]

A. They looked all right to me.

Q. Did you notice any infection in his throat?

A. No particular inflammation in his throat.

Q. Did you examine his nose and ears?

A. No, I didn't make an examination of his nose and ears.

(Testimony of W. W. Brothers.)

Q. Nothing to indicate that any trouble was coming from his nose and ears?

A. No sir, I didn't think so.

Q. You didn't want the Court to understand that you are saying that Mr. Stanger doesn't suffer pain in the dorsal region of his spine? A. No sir.

Q. Doctor, is excessive flowing ever caused by physical violence or injury?

A. Not unless there is a direct injury to the organ.

Q. You don't think there could be enough violence or force, trauma I think is the term, applied to the outside surface to produce excessive menstruation?

A. Not unless there was some pathological condition, not in a normal uterus.

Q. In a uterus that is not normal?

A. That is possible that it might increase the flow for a time.

Q. A violent blow across the abdomen would contribute to the excessive flow in a uterus not normal?

A. Might be a contributing cause.

Q. Probably would be a connection between the two. [258] A. Yes.

Q. Would the severe nervous shock followed by, or received at the same time, or followed by the physical injury and high nervous tension, would that tend to contribute to excessive flowing?

A. To some extent this increase of nervousness, to some extent.

Mr. Bowen: That is all.

(Testimony of W. W. Brothers.)

Redirect Examination

By Mr. Anderson.

Q. You say to some extent, can you be more definite on that. Would it be permanent or temporary?

A. Temporary.

Q. For what duration?

A. I think all those symptoms would clear up with a few days rest.

Q. I believe you said if there was an abnormal or diseased uterus, this wreck might have contributed to the cause. What do you mean by that?

A. I think it might possible cause some increase in the flow in an abnormal uterus.

Q. For the duration of time you referred to?

A. Yes, I think it would be temporary.

Q. What would you say of the nervous situation, or condition would that be the same?

A. Yes, I think that would be temporary. [259]

Q. With respect to Mrs. Stanger counsel referred,—I should say Mr. Stanger, counsel referred to exhibits 4 and 6, but he did not refer you to exhibit 5, now, refer to exhibit 5 and state whether you can tell from that exhibit whether there was an injury to the spine?

A. I think this was a very good picture of the spine, laterally, better than many we have.

Q. What does it show?

A. It doesn't show any injury.

(Testimony of W. W. Brothers.)

Q. Counsel asked whether he may be suffering pain, state whether your examination disclosed any reason for pain? A. It did not.

Mr. Anderson: That is all.

Recross Examination

By Mr. Bowen.

Q. In answer to Mr. Anderson you stated that following a nervous condition would contribute to excessing flowing. I will ask you if it is not true that it would contribute to the length of time it would continue in the individual?

A. That question isn't clear I don't understand it.

Q. I will try to reframe it. You said that excessive flowing may be contributed to by being in this wreck, and that it would, or might be contributed to by injury, or might be contributed to by nervousness, that would be only temporary.

A. Yes sir. [260]

Q. As to the length of time, the length of time it may continue, would that depend on the strength of the individual? Would it not continue until the nervous strain or tension was relieved or taken care of?

A. I think to some extent. It would depend on how long she was nervous. It would be rather minor if she went to bed and rested she would probably get over that in a few days.

(Testimony of W. W. Brothers.)

Q. Could you say that the condition would contribute to increased flowing during the time that the nervousness or the nervous tension existed.

A. One cannot say whether that is true or not.

Mr. Bowen: That is all.

Mr. Anderson: Yes, Doctor, that's all. [261]

L. R. NICHOLS

Being called as a witness on behalf of the defendant, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Anderson:

Q. State your name? A. L. R. Nichols.

Q. Where do you reside Mr. Nichols?

A. La Salle.

Q. What is your occupation?

A. Mechanical foreman.

Q. For whom?

A. The Union Pacific Railroad Company.

Q. How long have you been employed at that?

A. Thirty-three years.

Q. Were you at LaSalle in January 1940 when there was a derailment of train number 4?

A. Yes sir.

Q. How far is LaSalle from the point of derailment?

(Testimony of L. R. Nichols.)

A. The derailment was at Houston, Colorado.

Q. Did you go to the derailment?

A. Yes I did.

Q. How soon did you arrive there, after the derailment?

A. About fifteen minutes, fifteen or twenty minutes.

Q. State what you found in reference to the condition of [262] the train,—did you find a train?

A. Yes, a train there and part of it was derailed.

Q. How about the head end of the train, was it derailed?

A. No, the engine and the first two cars were on the track.

Q. Did you pay any attention to the number of cars in the train? A. Six, I think there was.

Q. Did you,—after you go there did you endeavor to determine what had caused the derailment? A. Yes sir.

Q. What did you find?

A. Found a broken wheel.

Mr. Witty: Objected to as incompetent, irrelevant and immaterial. Not within the issues in this case. It is an attempt to prove an affirmative defense which has not been pleaded.

The Court: This objection under sub-section (c) of rule 8, on the ground that one pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence,

(Testimony of L. R. Nichols.)

discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches,—now, an examination of the answer shows that it seems to be a specific denial of the complaint with no affirmative defense set up, rule 8 sub-section (c) in addition [263] to what I read, mentions; license, payment, release, *res judicata*, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. There is no affirmative defense set up here. The rule seems to require that if a party wants to set up avoidance it must be pleaded, but we have sub-section (b) of rule 15 relating to amendments to conform with the evidence and reads as follows: “When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure,” and so on.

Now, I am confronted under these two rules with this situation; the parties proceed on the pleadings as filed here, and we have proceeded to the extent of two witnesses having testified to these matters with no objection, and thereafter a motion was made, after the court announced an adjournment,—a motion to strike certain evidence. There is no question

(Testimony of L. R. Nichols.)

but what we proceeded with implied consent. Now, rule 15 provides for amendments to conform with the evidence, and then the party will have to make a showing that [264] they will have to have a continuance to meet these matters by reason of being prejudiced. This rule 15 is broad about amendments because it says that the Court must freely allow amendments to conform with the proof. We are proceeding now under a set of rules that may not permit such evidence but the Court can allow amendments to permit the proof. Let's see what we have here. You have charged defective equipment and now, they come in and offer evidence as to the condition of the equipment. I think we have an issue here; you have charged defective equipment and they have made a denial I think it makes an issue. The motion to strike will be denied and the objection to the evidence is overruled.

Q. Mr. Nichols, did you locate all of the parts of the broken wheel? A. I did.

Q. State whether or not there was a part of the wheel left on the axle. A. Yes sir, the plate.

Q. Then how many other pieces did you find?

A. Five.

Q. State whether or not the breaks on these parts were new or old breaks.

A. All new breaks.

Q. What did you do with these parts? [265]

A. Collected them all up and packed them and

(Testimony of L. R. Nichols.)

shipped them from LaSalle to Doctor Barr in Omaha.

Q. What do you know about Doctor Barr? Who is he, what is his title or what he does on the Railroad?

A. At that time he was engineer of tests.

Mr. Anderson: You may cross examine.

Cross Examination

By Mr. Bowen:

Q. You say that you collected these broken parts of the wheel. Did you yourself collect the broken parts?

A. Yes sir.

Q. Where did you collect them from?

A. Alongside the track.

Q. Did you gather up all the parts of the wheel?

A. Five broken parts of the rim.

Q. You then had a complete wheel?

A. A complete rim of the wheel. The plate and hub was on the axle.

Q. After you got through collecting the wheel and put the parts back together did you have the wheel in the same form as it was before it was broken, or was there any parts missing?

A. It was all there.

Q. And the parts all fit together?

A. Yes sir.

Q. You, of course, do not attempt to state what caused it [266] to break?

A. No sir.

Q. There were six cars in this train, you said?

(Testimony of L. R. Nichols.)

A. Yes sir, as I recollect but I would not be sure about that.

Q. There may have been more or less?

A. Yes sir.

Q. Can you tell us anything as to the age of the wheel? A. No I cannot

Q. Or the type or the make? A. No sir.

Mr. Bowen: That is all

Mr. Anderson: That's all.

The Court: We will recess until 10 tomorrow morning.

10 O'clock A. M. Oct. 22, 1941

JOHN A. SCHRODER

Being called as a witness on behalf of the defendant, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Anderson:

Q. State your name please?

A. John A. Schroder.

Q. Where do you live? A. Denver. [267]

Q. What is your occupation?

A. General Car foreman, Union Pacific.

Q. How long have you been general car foreman?

A. At Denver a little over five years.

Q. How long have you been with the Union Pacific? A. Since 1920.

(Testimony of John A. Schroder.)

Q. In what department?

A. Car department.

Q. Were you general foreman in January,—on January 14, 1940? A. Yes.

Q. Do you recall a derailment at Houston, Colorado, on January 14, 1940? A. Yes sir.

Q. Did you go out there? A. Yes sir.

Q. How long after the derailment did you get out there? A. Approximately two hours.

Q. What did you find when you got out there? In reference to the head end of the train, state whether it was on the track or not.

A. The head four cars were on the rails.

Q. Was there an engine ahead of these cars?

A. Yes sir.

Q. Was it on the track?

A. It was on the track. [268]

Q. Did you make an inspection of these four cars? A. Yes sir.

Q. What did you find?

A. The first three cars, there were no defects, the fourth car which was a coach had a broken wheel on the truck, the lead wheel on the right side of the truck.

Q. How much of the broken wheel was left on the truck?

A. Approximately 16 inches of the plate.

Q. State whether you inspected this,—first did you inspect the other cars the three ahead, as well

(Testimony of John A. Schroder.)

as this one to determine whether or not there was anything missing from those cars?

A. Yes, I did, and there were no car parts missing.

Q. Did you inspect the track west or toward Houston from the point where the head end of the train was to the derailed cars?

A. Back to the derailed cars.

Q. Yes. A. Yes, I did.

Q. Did you find anything along the track,—state what you found,—did you find anything between these cars back to where the other cars were derailed?

A. No sir, no car parts.

Q. Part of the wheel was on the axle?

A. Yes.

Q. Did you inspect that? [269] A. Yes.

Q. State whether or not the breaks were old of new breaks?

A. All new breaks.

Q. Can you give me the consist of that train,—what did it consist of?

A. Yes, a mail car, two baggage cars, a coach, pullman tourist, another coach, a pullman standard and another car, a cafe lunch car.

Q. Eight cars? A. Yes sir.

Q. Four coupled to the engine? A. Yes sir.

Q. Any derailment of the cars coupled to the engine?

A. No sir, all wheels were on the rails.

Q. This Pullman were you on the inside of the car after the derailment?

(Testimony of John A. Schroder.)

A. Yes sir, after I had the car back on the rails.

Q. State whether or not there were anything in the way of parts, whether there was anything broken inside of this car? A. No broken parts.

Q. Were there,—state whether or not any seats were broken? A. No sir.

Q. Or windows? A. No sir.

Q. Did you find any loose bolts? [270]

A. No sir.

Q. Or anything of that sort. A. No sir.

Q. Where was the damage to this car?

A. On the underneath side, on the outside of the car.

Q. Was there any truck of this pullman car that had come out from under this car or the preceding car? A. No sir.

Q. Have you made measurements of the section in a Pullman car as well as measurement concerning the ordinary card table that is placed between the seats? A. Yes sir.

Q. Can you give those dimensions?

A. The top of the table is 27 inches,—from the table to floor; to the top of the seat free height $16\frac{3}{4}$ inches; from the top of the seat to the top of the table free height $10\frac{1}{4}$ inches; width of the table $27\frac{3}{4}$ inches.

Q. From back of seat to back of seat.

A. $57\frac{1}{2}$ inches.

Q. Are those cushioned seats? A. Yes.

(Testimony of John A. Schroder.)

Q. Did you have any other measurements on the seat backs?

A. Head rest to head rest 64 inches.

Q. Are the backs cushioned?

A. Yes sir. [271]

Q. Did you measure from the seat up to the top of the back of the seat?

A. No sir, I have no measurement on that.

Mr. Anderson: That's all. You may examine.

Cross Examination

By Mr. Bowen:

Q. How did you find out about this wreck?

A. I was notified by the master mechanic.

Q. What did he tell you?

A. That number four was derailed.

Q. You got there in about two hours.

A. Yes sir.

Q. Was the engine and train crew there when you got there?

A. Yes sir, both were there.

Q. What does the engine crew consist of?

A. Engineer and fireman.

Q. Both were there? A. Yes sir.

Q. Do you know the engineer and fireman?

A. The engineer was Mr. Lewis and I don't know the fireman.

Q. Who was the train's conductor?

A. Mr. Cross.

Q. Do you know either brakeman?

(Testimony of John A. Schroder.)

A. No sir.

Q. Was there a pullman conductor?

A. I don't know. I didn't see him. [272]

Q. You don't know whether there was a pullman conductor there on that Pullman standard or not?

A. I didn't see a pullman conductor.

Q. Were there any porters?

A. I don't know. I didn't see any pullman porter.

Q. Do you know whether there was one or more pullman porters?

A. I didn't see a pullman porter.

Q. I think you said that the trucks of this pullman car had not left the track?

A. I didn't say that.

Q. Then I will ask you, did they leave the track?

A. Yes sir.

Q. Which side did they go off on?

A. The car went on the north side.

Q. The right or left hand side?

A. The right hand side in the direction *in* was moving.

Q. You are sure that would not be the south side.

A. As I recall it would be the north.

Q. If some of the witnesses testifies that the cars went off on the south side that would be wrong?

Mr. Thompson: Objective as argumentative and a comparison with other witnesses testimony.

(Testimony of John A. Schroder.)

The Court: Sustained. A comparison of testimony of one witness against another is not recognized here.

Q. Now, you don't profess to testify as to what caused this wreck? [273]

A. No sir.

Q. You don't know what caused it do you?

A. It was the broken wheel is all I know.

Q. You don't know what else may have been wrong? A. No sir.

Q. You don't always have a wreck because of a broken wheel.

A. That is the first broken wheel I ever saw under a passenger car.

Q. How many wheels on this truck under the standard pullman?

A. Six, three pairs under each end.

Mr. Anderson: You are asking under the pullman?

A. Under the pullman car.

Q. Twelve wheels under this pullman car?

A. Yes sir.

Q. Can you describe just generally, how these trucks are constructed, how they are held on?

A. Generally cast in one unit, a unit which holds the wheels and axles, there are axles, wheels, journals in journal boxes and they are all equipped with equalizers to equalize *the* for in any road shock, and all cushioned on springs both elliptic and coil.

(Testimony of John A. Schroder.)

Q. What is the distance from the front truck to the back truck?

A. That would depend on the size of the car.

Q. This particular car, do you remember the size?

A. No sir.

Q. Where was the front truck when you got there? [274]

A. Under the car?

Q. And attached to it?

A. Yes sir.

Q. Was the car level or one end up higher?

A. The front end was down in the ditch further and would be lower.

Q. How deep was the borrow pit there?

A. The grade was not over four feet I would say.

Q. Was the ground frozen?

A. Just a shell on top.

Q. Now, this broken wheel that you testified about was that under the car that had not been derailed or under that car,—or a car that had been derailed?

A. A car that had not been derailed.

Q. The broken wheel was on the car ahead of the first derailed car?

A. That is right.

Q. You stated that there were no car parts missing, were there any parts missing of this broken wheel?

A. The wheel was broken and the parts that had come from this broken wheel was along the right of way, I didn't see them.

(Testimony of John A. Schroder.)

Q. You did not refer to the wheel when you said there were no car parts missing?

A. No sir, not the wheel.

Q. You inspected the track?

A. Yes sir. [275]

Q. Your duties as car foreman do you inspect the tracks?

A. I referred to that as an inspection of the vicinity to see if any car parts were missing?

Q. You made no inspection of the track?

A. No sir.

Q. As to the gauge of the track you would not be able to tell us? A. That's right.

Q. You said that all of the wheels were on the track, which wheels do you refer to?

A. Which car have you reference to?

Q. You said all the wheels were on the rails.

A. No, some were off the rails.

Q. Some were off the rails?

A. Yes, on the derailed cars.

Q. How many wheels were off the rails?

A. All of the cars that were derailed.

Q. How many would that be?

A. There were four cars.

Q. Would the same number of trucks be under all the cars as the Pullman you testified about?

A. Yes sir.

Q. What did you mean by no car parts missing?

A. No brake riggings, or coupling gear or any part pertinent to the operation of the car.

(Testimony of John A. Schroder.)

Q. This pullman, how was it located? [276]

A. Upright with a slight leaning, the rear end of the car was approximately eight or ten feet from the rail and the head end probably fifteen feet. At an angle.

Q. Was any part of this pullman car on the side of the car touching the ground.

A. No part of the side was on the ground.

Q. Just the underneath part was touching the ground? A. Yes sir.

Q. No windows broken in the car?

A. No sir.

Q. You looked for that? A. Yes, I did.

Q. Nothing disturbed inside of the car?

A. They were all in place.

Q. Any of the seats torn loose?

A. No sir.

Q. Any of the berths fallen down?

A. No sir.

Q. Any upper berths down? A. No sir.

Q. No pieces of metal or screws or bolts laying around there? A. No sir.

Q. No dirt on the floor?

A. Just foot tracks, nothing shaken down or anything like that.

Q. The inside of the pullman car was in a normal condition? A. That's right. [277]

Q. This table which you referred to was a card table? A. Yes sir.

(Testimony of John A. Schroder.)

Q. Did you find a card table there that had been in use recently?

A. I don't recall any individual table in this car.

Q. Did you look for a table to see if one had been in use recently?

A. No, because it is a accessory and not a standard part of the car.

Q. There may have been one in use recently?

A. I cannot say.

Q. How are they attached to the car?

A. There are wall brackets and there are two lugs; these lugs are placed in the wall and the table comes to its normal position with these lugs being in the wall.

Q. Is there anything on the outside of the table?

A. Yes, folding leg.

Q. How wide or deep is the top portion of that table?

A. About approximately half an inch.

Mr. Bowen: That is all

Redirect Examination

By Mr. Anderson:

Q. The Broken wheel was on which car?

A. Union Pacific Coach 1224.

Q. Which car was that from the Engine?

A. The Fourth car. [278]

Q. Did you state that all four of these cars were on the rails?

(Testimony of John A. Schroder.)

A. Yes sir, and the mate wheel of the broken wheel was on the rail when I arrived there?

Q. And the engine was on the track?

A. Yes sir.

Q. Which side of the train as it was moving was the broken wheel on? A. The right.

Q. On the side that it went off the track?

A. The Broken wheel was not off the track, it was on the right side referring to the movement of the train.

Q. Would that broken wheel be on the side on which the Pullman car went off the track?

A. On the side the Pullman car went off, yes.
Mr. Anderson: That's all.

Mr. Bowen: That's all. [279]

CLAUDE R. PFLASTERER

Being called as a witness on behalf of the defendant, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Anderson:

Q. State your name?

A. Claude R. Pflasterer.

Q. Where do you reside?

A. Omaha, Nebraska.

Q. What is your occupation?

A. Metallurgical engineer, for the Union Pacific.

(Testimony of Claude R. Pflasterer.)

Q. How long have you been a Metallurgical Engineer?

A. Doing that work since 1921, and had the title since 1936.

Q. What do you do as a metallurgical engineer for the Union Pacific Railroad Company?

A. Make investigations of new materials and materials that have failed.

Q. Testing metals? A. Yes sir.

Q. All kinds? A. Yes sir, all kinds.

Q. Are you a licensed engineer in the State of Nebraska?

A. Yes sir, a licensed professional engineer.

Q. In the field in which you are engaged.

A. Yes sir. We do outside work too. [280]

Q. Mr. Pflasterer, did you have occasion to test,—make any test of a wheel that was broken in a derailment at Houston, Colorado, January 14, 1940?

A. Yes sir.

Q. What did you test that for?

A. To determine the cause of the breakage.

Q. Did you determine the cause of the breakage? A. Yes sir.

Q. Will you explain to the Court what your test or inspection disclosed?

A. This wheel was sent to the laboratory and we made an examination to determine the initial cause of the breakage, an examination of the metal, we cut a section adjacent to the point of the fracture and placed it in a solution of acid to develop

(Testimony of Claude R. Pflasterer.)

the structure and to see if there was any internal structural defects at the point where the fracture extended to the surface. That etching shows that it was clean, dense structure showing no defect in the plate area. The original and initial fracture took place in the plate circumferentially on the back side and the fracture went around in the thinnest point of the wheel, and out through the rim. You could see where the break started, that is indicated by the texture of the steel, you could see where it ruptured. The outside of the plate edge is serrated, so there is no mistake but what it started on the back side, or the flange side of the [281]wheel and extended to the outside. I took drillings to determine the chemical properties. All wheels are bought under specifications that they have certain physical properties and chemical properties, that is done at the mill by our inspectors, that is, they are inspected after being made under the specifications, they are then inspected for diameters, plate thickness and so on.

Q. Did you make a chemical analysis?

A. No sir, I prepared the drillings however.

Q. I show you exhibits "8" and "9". What are those exhibits?

A. They are both broken portions of the wheel. This is negative number 4838 L.

Q. Just what is the exhibit?

A. Exhibit "8"

(Testimony of Claude R. Pflasterer.)

Q. Yes.

A. It is the plate section of the wheel as removed from the axle, this is the portion that broke off.

Q. And exhibit "9"?

A. It is a portion of the plate and the rim and flange section of the wheel.

Q. Those are photographs of the wheel?

A. Yes sir, taken under my supervision.

Q. Are they accurate pictures of this wheel which you have testified to testing?

A. They are photographs of that wheel. [282]

Mr. Anderson: We offer exhibits 8 and 9 generally for the purpose of illustrating what the witness is talking about.

Mr. Bowen: May we ask a question or two for the purpose of an objection?

The Court: You may do so.

Q. By Mr. Bowen: Directing your attention to exhibit 8, was all of the matter that appears in the photograph, was that all on there at the time you received this object shown here?

A. You want to know if that is the condition of the wheel when I first seen it.

Q. Yes.

A. Yes sir, I seen that portion on the axle at Houston.

Q. Was everything shown in exhibit 8 on there at the time you received it?

(Testimony of Claude R. Pflasterer.)

A. I am wondering if this little marking here, "outside face" was on there. I placed that on there.

Q. Where did you get this wheel or the parts from? A. From the store department.

Q. Do you know how many hands it had gone through before you received it? A. No sir.

Q. Did you go to the scene of the wreck?

A. Yes sir.

Q. How soon after the wreck? [283]

A. The wreck was Sunday morning and I was there Monday morning a little after five.

Q. Did you remove the broken portion of the wheel while you were there? A. No sir.

Q. Did you gather up the broken pieces of the wheel while you were there? A. No sir.

Q. Do you know who did, if anybody?

A. Yes, I know one man that helped.

Q. Do you know who else helped?

A. I was not there and all I know is what they told me.

Q. You were not there.

A. I was not there when the portions of the wheel was picked up, they shipped it in on the stream liner.

Q. Who picked them, who did you get them from?

A. They were put on the Stream Liner.

Q. You don't know.

A. They were put on the stream liner and addressed to Dr. Barr and removed to the laboratory,

(Testimony of Claude R. Pflasterer.)

as soon as they could be removed, they brought them down.

Q. Do you know everything you are testifying about from your personal knowledge?

A. Certainly.

Q. You were not there when this was all done.

A. No, not when it was picked up. [284]

Q. When did you see the broken fragments, not the parts on the axle?

A. I saw them in the morning,—Tuesday after the accident .

Q. The derailment was when?

A. I saw them on Tuesday after I returned from Denver.

Q. Your testimony is the same as to exhibit 9 as it has been to exhibit “8”?

A. I guess I don’t understand.

Q. Was the object shown in exhibit “9” as to how you came in possession, when and the manner in which you came in possession, the same as you have testified to in regard to exhibit “8”?

A. They came to me. There were five pieces, they were delivered to the laboratory platform and I brought them in, mounted them on this Board and assembled them in the correct position when I cut the specimen.

Mr. Bowen: We move to strike that part of the answer about assembling them in the correct position as being a conclusion on the part of the witness.

The Court: It may be stricken.

(Testimony of Claude R. Pflasterer.)

Q. Did the objects indicated on exhibit "9" come into your possession in the same manner and at the same time as the objects shown in exhibit "8" came into your possession?

A. You want me to say no——

Q. I want you to answer the question. [285]

A. These fragments of the wheel were delivered to be in five pieces as you see them here. Then I got this section and prepared it for the etching test.

Q. When did you get the broken portions as indicated in proposed exhibit "9"?

A. I got them Tuesday morning.

Q. After the wreck. A. Yes sir.

Q. You testified that you did not see them before you received them?

A. That's right, these are the parts I didn't see.

Q. You didn't.

A. I didn't see these until they were delivered to the laboratory.

Mr. Bowen: We object to the introduction of exhibits "8" and "9" for the reason that it now appears that this witness never did see the portions of the wheel that he has constructed for this purpose, prior to the time they arrived in his office. No foundation has been laid with this witness for the introduction of these exhibits. He did not see the broken portions of the wheel at the wreck, someone sent some broken portions of a wheel to his office and he assumed from hearsay that they

(Testimony of Claude R. Pflasterer.)

were portions of the broken wheel. There is no continuity of possession. It is too remote and no proper foundation is laid. [286]

Mr. Anderson: I will ask a few more questions if I may and then reoffer the exhibits.

The Court: Very well.

Q. State whether or not this broken wheel,—these broken parts of the outside of the wheel fit the core of the wheel that you saw on the axle at Houston? A. Yes sir.

Q. How were those parts shipped to your Department, did they come crated or boxed?

A. They came,—they put them in the baggage car and put tags on them, package numbers 89, 90 and so on.

Q. Where were they shipped from?

A. La Salle, by Mr. Nichols.

Mr. Bowen: We object to that as a conclusion.

By Mr. Bowen:

Q. Were you present at the time the portions of the wheel were shipped? A. No sir.

Mr. Anderson: I reoffer the exhibits.

Mr. Bowen: So that your statement is a conclusion.

A. No it is not, I have the shipping notice that we got, it was marked from Mr. Nichols at La Salle the date this package bears, I happen to have that in my possession.

Mr. Bowen: We object to his testifying as to hearsay evidence and we move that it be stricken.

[287]

(Testimony of Claude R. Pfasterer.)

Mr. Thompson: Mr. Nichols said that he gathered these up, took the portions to the car and shipped them to Dr. Barr

The Court: Objection overruled, he traces it properly.

Mr. Anderson: I think we offered them again, if not, we now offer exhibits "8" and "9"

The Court: What do they purport to cover? Do they purport to cover the broken portions of this wheel?

A. They are photographs of the broken wheel involved in the derailment at Houston, Colorado.

The Court: When did you arrive at the scene of this accident?

A. Monday morning about 5:30.

The Court: Did you examine the broken wheel?

A. The portion on the axle.

The Court: Does the exhibit represent correctly the parts of the wheel that you examined when you got there?

A. Yes, these fit together.

The Court: The rule is that a photograph of the place where an accident occurs, or what was there at the time, are admitted if the conditions appear on the photograph are the same as at the time of the [288] accident, for illustrative purposes. This witness seems to say that he appeared and examined this wheel, the parts of the broken wheel and this photograph was taken afterward and that they show the condition the same.

(Testimony of Claude R. Pflasterer.)

Mr. Bowen: My objection goes to the broken parts that this witness did not see and didn't *seen* until someone delivered some broken parts to his office.

The Court: Is that true?

A. I saw one part on the axle.

The Court: Then why did you say that you saw the broken parts.

A. I saw the part that was on the axle and these parts that I received fit on that part perfectly.

The Court: Of course, you have to see what you take a photograph of.

Mr. Thompson: I have this to say if the Court please, I think he said with respect to the core of the wheel, that he saw that at Houston, Colorado and I want to clear this up, because this witness has made no deceptive statement. Mr. Nichols said that he picked up the rest of the wheel and shipped it in, this man says he *say* the portion of the wheel on the axle and these parts fit perfectly.

The Court: The physical conditions must be shown to be the same as existed at the time of the accident. Mr. Nichols said that he picked these parts [289] up and sent them in, and this man fixed it up and had it photographed.

Mr. Anderson: Yes sir.

The Court: The two witnesses gave a complete identification. I think in view of Mr. Nichols' testimony and this witness's testimony, to the effect that

(Testimony of Claude R. Pflasterer.)

Mr. Nichols gathered the parts up and sent them in at the time of the accident and they were received in the ordinary way. I will admit them for illustrative purposes with that limitation, to aid the Court, if possible, I will admit them.

Q. Mr. Pflasterer, you didn't explain what caused this wheel to break?

A. They didn't ask me.

Q. Will you answer that?

A. Yes sir. This wheel broke due to internal stress that are locked up in the plate that develop during the manufacture. The way we determine if such stress existed, we cut through from the hub through the plate, before they are cut you place punch marks every two inches and when the cut is made you observe the behavior of the wheel, in this case the tool bound and it was necessary to put in a wedge and continue through the wheel.

All the railroads purchase wheels under "A R A" and when they were not control cooled we sometimes had this. The reason these stresses are set up is due to [290] the difference in heat. In the construction of the wheel the outside portion is a heavy mass and the hub is a heavy mass, the plate is thin and unless it is control cooled these stresses set up, and they were there.

Q. What is the A R A?

A. American Railway Association.

Q. What is that?

(Testimony of Claude R. Pfisterer.)

A. An association that makes the specifications for the manufacture of wheels, A R A conforms to the railroad specifications all over.

Q. Does that extend over the United States?

A. Yes sir.

Q. What railroads does the A R A cover, is it the Class A railroads? A. Yes sir.

Q. Do you know what the Class A roads are?

A. They are the best.

Q. For instance what are they through Omaha?

Mr. Bowen: Objected to as leading.

The Court: Yes, it is leading.

Q. You say they are class A railroads, is one of them the Union Pacific?

Mr. Bowen: And the Union Pacific goes through Omaha.

Mr. Anderson: If you will agree to those matters we won't go into the matter. [291]

Mr. Bowen: We agree.

Q. Now, it may not be entirely clear, what do you mean by the plate?

A. That is the thin section between the hub—that is pressed on the axle, and the outer, the tread or the flange on the inside of the tread.

Q. That broke at or in the plate?

A. Yes sir.

Q. How do you know it first broke in the plate?

A. By the direction in which the metal ruptured.

Q. Which way did it rupture?

(Testimony of Claude R. Pflasterer.)

A. From the inside face, the flange side, outward. The edge at the outside is serrated, irregular, it is no trick to trace it.

Q. Do you mean from the hub out?

A. I mean in the thin part of the plate, between the hub and the outside, at a point where the plate metal is the thinnest. The reason these stresses are there is that the heaviest masses of the metal cool last, they don't cool as rapidly as the plate and set these stresses up.

Q. State whether or not the break that was in this wheel, or the internal stresses which you spoke of were they observable from the outside of the wheel?

A. No way to find them without cutting the wheel up. [292]

Mr. Bowen: I move to strike that as a conclusion of the witness, that there is no way to find them.

The Court: I cannot strike the answer and the question.

Mr. Bowen: I move to strike the answer for the purpose of objection.

The Court: It may be stricken.

Mr. Bowen: I object to the question upon the ground that it called for a pure conclusion of the witness.

The Court: He expressed his opinion from his personal knowledge. Overruled.

Q. In your examination of this wheel did you

(Testimony of Claude R. Pflasterer.)

discover any condition which indicated that there was any heat on this wheel? A. Nothing.

Q. On the broken parts did you find anything to cause the wheel to break?

A. No, it was bright and shiny, having been recently turned, the tool marks still on the outer part.

Q. State whether the breaks on the plate or core of the wheel were new or old breaks?

A. All new breaks.

Q. Do you know whether or not the breakage of wheels of this fashion is frequent or rare? [293]

A. They are rare, we have had two.

Q. In what period of time?

A. That has been during the time I have been in the laboratory, back to 1912.

Q. Do you know whether you have had any of these similar wheels in service during that time?

A. We have them now. We have wheels of that type all over the country.

Q. How long have you had them in service?

A. This particular wheel was manufactured, rolled in 1928.

Q. Do you know whether you have wheels in service now, dating from that time?

A. Yes, lots of them.

Q. Do you have any idea how many wheels of similar kind are now rolling, or in service, is it one or many?

(Testimony of Claude R. Pflasterer.)

Mr. Bowen: Objected to as incompetent, irrelevant and immaterial, beyond the issues in this case.

The Court: Overruled.

A. We have thousands of them.

Q. How long have you been using them?

A. Since they made rolled steel wheels.

Q. When did you first start to use the kind of wheels that were under this car, that particular car?

[294]

A. Since we started to use rolled steel wheels.

Q. How long ago was that?

A. To my knowledge better than thirty-five years, that is as long as I have been on the property.

Q. Can you state whether or not other railroads use the same kind of wheels?

A. Yes sir, made by the same mill to the same specifications.

Mr. Anderson: That is all. [295]

Cross Examination

By Mr. Bowen:

Q. I think you said that the defect in this wheel was in it when the wheel was made?

A. I said, or intended to say that it developed during the manufacturing of the wheel.

Q. The defect was in when the wheel was manufactured?

A. The stresses were during the manufacturing process.

(Testimony of Claude R. Pflasterer.)

Q. This defect was the defect of which you testified, in this wheel when it was manufactured?

A. I don't call it a defect.

Q. Was the stress that caused the wheel to break, present when the wheel was manufactured?

A. They developed during manufacture.

Q. The thing that caused the wheel to break was in there as soon as the wheel was turned out?

A. When it left the mill.

Q. The condition that caused the wheel to break would be a defect would it not?

Mr. Thompson: Objected to as argumentative.

The Court: Have you defined a defect?

A. Yes, I think I did.

The Court: Then this would be for the Court to determine.

Mr. Bowen: I guess that's right.

Q. Mr. Pflasterer, you made no inspection of the rails or [296] track at the point where this wreck occurred?

A. Yes, I did.

Q. You made an inspection? A. Yes sir.

Q. You inspected the rails and track, were they your duties as an engineer?

A. I do when the Vice-president tells me to.

Q. Did you inspect the track before the wreck?

A. No sir.

Q. It was after? A. Yes sir.

Q. Then, as to the condition of the track at the time of the wreck you don't know? A. No sir.

(Testimony of Claude R. Pflasterer.)

Q. The gauge may have been wide or tight at the time of the wreck?

Mr. Thompson: Objected to as not proper cross-examination.

A. I wouldn't know.

The Court: He has answered now, so it may stand.

Q. Was there a switch near the point of the wreck?

Mr. Thompson: Objected to as not proper cross-examination.

The Court: Sustained.

Q. I don't know whether it is clear or not, but how many [297] pieces of the broken wheel did you get?

A. I cut one off.

Q. The part that was on the hub and five others, were there?

A. Five without that part.

Q. What is the fact Mr. Pflasterer, as to whether or not climatic condition has anything to do with the various stresses that you have explained to us, in causing wheels to break.

A. What you want to know is whether these stresses were sufficient to cause the wheel to break.

The Court: He asked what effect the climatic condition has on it.

A. You can break steel in cold weather easier than when it is warm.

Q. Explain to the Court what effect cold weather has on steel as to contraction and expansion.

(Testimony of Claude R. Pflasterer.)

A. Severe cold weather would have an effect, but not the kind we had there. We design our wheels to take care of that.

Q. The climatic condition does have an effect?

A. Yes sir.

Q. Cold or hot?

A. I wouldn't say that hot weather does, on wheels of that type.

Q. Don't you have wheels break because of heat?

A. Not weather heat. Friction heat, brake shoes and so on. [298]

Q. You have heard of heat breaks?

A. Yes sir.

Q. Axles burning off? A. Yes sir.

Q. Of hot boxes? A. Yes sir.

Q. And wheels breaking?

A. More particularly chilled cast wheels.

Q. Any wheel? A. Yes.

A. It is a common thing.

A. It is not as common as it used to be. We have some wheels on the stream liners now,—we have alloys that stand all that.

Q. That is not unusual,—an unusual occurrence for them to heat from friction and develop cracks.

A. They do that, yes sir.

Q. I don't know whether I understood you. Did I understand you to say that the heavy masses of metal referring to the outside of the wheel, and the inside of the wheel, that those parts cooled first?

A. No, they don't cool first, that would be silly.

(Testimony of Claude R. Pflasterer.)

This plate cools first that is why we get stresses in the plate.

Mr. Bowen: That is all.

Redirect Examination

By Mr. Anderson: [299]

Q. From your examination of that wheel and its parts, are you able to say whether or not there was any friction or any heat produced to that wheel, which caused the break?

A. No sir, there was not.

Mr. Anderson: That is all.

Mr. Bowen: That is all.

ROBERT W. SAVAGE

Being called as a witness on behalf of the defendant, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Anderson:

Q. Will you state your name?

A. Robert W. Savage.

Q. Where do you live? A. Omaha.

Q. What is your occupation?

A. Head chemist for the Union Pacific.

Q. How long have you held that position?

A. Twenty-four years.

Q. What education and training did you have for that profession?

(Testimony of Robert W. Savage.)

A. Graduated from the University of Chicago, year of teaching, and graduate study.

Q. Have you been engaged in your line of work since graduating? A. Yes sir. [300]

Q. Are you a licensed chemical engineer in the State of Nebraska, Mr. Savage? A. Yes sir.

Q. What do you do as a chemical engineer of the Union Pacific Railroad Company?

A. I make, and have supervision of the making,—I will put it this way, I have supervision of the laboratory and make a great many chemical analyses for the Union Pacific.

Q. Of metals? A. Yes sir, metals.

Q. Did you have occasion to make a chemical analysis of a broken wheel in January 1940?

A. Yes, I did.

Q. Where did you receive the parts of that wheel, who did you receive them from, to make the analysis? A. Mr. Pflasterer.

Q. Do you know where it came from or what train it was in at the time it broke?

A. Yes, I did.

Q. What train was it in? A. Number 4.

Q. Where? A. Houston, Colorado.

Q. Do you know the date? A. Yes sir.

Q. What is the date? [301]

A. The 14th of January 1940.

Q. Will you state Mr. Savage, what your chemical analysis show of that wheel?

(Testimony of Robert W. Savage.)

A. Showed a carbon content of 172 of one per cent; manganese .82 of one per cent; phosphorus .039 of one per cent; sulphur .024 and silicon .27.

Q. Do you know whether these wheels are governed by chemical standards or specifications? Are they required to meet certain specifications?

A. Yes sir.

Q. What have you to say with reference to this wheel which you analyzed, as to whether or not, chemically, it was within the specifications required.

A. It was well within the specification limits.

Mr. Anderson: That is all, you may examine.

Mr. Bowen: No cross examination.

Mr. Anderson: The defendant rests.

A. G. STANGER

Being called in rebuttal on behalf of the plaintiff, having heretofore been duly sworn, testifies as follows:

Direct Examination

By Mr. Bowen:

Q. Mr. Stanger, directing your attention to exhibit 7, I will ask you to examine it and state, if you know, what it is? [302]

A. Yes sir.

Q. What is it?

A. It is the authority I gave Mr. Whitsell, in our office at the time he visited me, requesting this, with the understanding that if I——

(Testimony of A. G. Stanger.)

Q. —we will come to that later Mr. Stanger. Do you know who Mr. Whitsell is?

A. I was informed that he was a claim agent for the Union Pacific.

Q. Does his name appear on defendant's exhibit "7"?

A. It appears down below written in blue pencil.

Q. Who informed you that he was claim agent for the Union Pacific Railroad Company?

A. He did.

Q. Now, Mr. Stanger, at the time did Mr. Whitsell write defendant's exhibit "7" or did you?

A. He wrote it.

Q. After he wrote it what if anything did he do with it, did you sign it?

A. Yes sir, I signed it.

Q. Was there any conversation between yourself and Mr. Whitsell immediately before or at the time that you signed defendant's exhibit "7"?

A. Yes sir.

Q. Was that conversation regarding this case, or your injury that you received on the railroad?

[303]

A. Yes sir.

Q. What was said there at that time and place?

Mr. Thompson: I object to this question, there is a writing and the writing is the best evidence and speaks for itself, the question is irrelevant, incompetent and immaterial.

(Testimony of A. G. Stanger.)

The Court: Is it the purpose to bring out a conversation which relates to this exhibit? Is that the purpose?

Mr. Bowen: The conversation we seek to *illicit* is a conversation as to the reason for the making of defendant's exhibit "7" and for giving the authority that Mr. Stanger gave at the time, that is the purpose of this conversation.

The Court: Does it go to the extent of determining how broad this is, or the terms of this exhibit?

Mr. Bowen: It goes solely to Mr. Stanger's reason for the authority.

The Court: I think you may answer, limited to the reason for giving it.

Q. State what that conversation was.

A. Mr. Whitsell asked if I would give a statement so that their Doctors, or the Doctors that they suggested could examine me, that is, to bring about a settlement of this case, that it was their desire to have this examination with the understanding that it would be promptly taken [304] care of without further delay.

Mr. Thompson: The question was not put nor the answer given for the purpose stated but presented to the Court for the purpose of getting before the Court the suggestion that the claim agent, through an offer of compromise had gotten this statement, and both the question and answer are incompetent, irrelevant and immaterial. The claim

(Testimony of A. G. Stanger.)

agent is not shown to have any power to authorize settlement or recognize or determine liability.

The Court: The question is a broad one, and it goes to whether we can vary the terms of a written instrument.

(Further statement of counsel and Court)

The Court: The objection is sustained and the motion, if there was a motion to strike is granted.

Q. You did go to see Doctor Cline?

A. Yes sir.

Q. Did you call him or did he call you prior to your going to see him?

A. He called the office and left word for me to come to his office.

Q. What did you do?

A. I went up to his office.

Q. Did Doctor Cline, after you arrived there, suggest that you, or advise you to have a plaster paris cast applied [305] to your body?

A. Yes sir.

Mr. Bowen: That is all, you may cross examine.

Mr. Anderson: No cross-examination.

PHYLLIS STANGER

Being called in rebuttal, on behalf of the plaintiff, having heretofore been duly sworn, testifies as follows:

Direct Examination

By Mr. Bowen:

Q. Directing your attention to the evening of October 9, 1941, at the L. D. S. Hospital in Idaho Falls, at the time you were examined by Doctor Brothers, did you or not, state to Doctor Brothers at that time that you have been flowing excessively since the birth of your last child?

A. I did not.

Q. Did you say anything to the Doctor at that time about your condition of flowing at any time?

A. I did not.

Q. Directing your attention to November 10, 1940 at the time you were in the office of Doctor Wooley, in Idaho Falls, Idaho, yourself and the Doctor being present, did you or not state to Doctor Wooley that your period of flowing had been and was for a period of eight or ten days twice a month?

[306]

A. I did not.

Q. Did you or not, state to Doctor Wooley at that time and place that you had flowed excessively during the past four years?

A. I did not.

Mr. Bowen: That is all.

(Testimony of Phyllis Stanger.)

Cross Examination

By Mr. Anderson:

Q. Did you or not go to Doctor Wooley for the purpose of giving you some sort of treatment for excessive flowing? A. No sir.

Q. What did you go for?

A. To find out why I was not building up as fast as I should.

Q. And not for the purpose of checking the flow.

A. For checking the flow, but not excessive flowing.

Mr. Anderson: That is all.

Mr. Bowen: We rest.

The Court: Then Both Sides rest.

Mr. Anderson: At this time the defendant, at the close of the evidence, both sides having rested, moves the Court for judgment in defendant's favor and for a dismissal of the complaint in both cases which were consolidated for trial upon the following grounds and for the following reasons:

1. That the plaintiff has failed to establish that the defendant was guilty of any negligence but to the contrary [307] the evidence established, without dispute that the derailment was caused by a broken wheel, that said wheel broke from internal stresses, internal residual stresses, and that such condition

could not be observed by any kind of inspection except only such inspection or analysis as was made by the defendant's witness Pflasterer, who made tests of the metal after the wheel had broken, and that such breakage is extremely rare and is one that the defendant could not have guarded against.

2. That there is no evidence that plaintiff A. G. Stanger sustained any injuries as a result of such derailment.

3. There is no evidence that the Plaintiff Phyllis Stanger sustained any injuries as a result of said derailment, and that the condition she asserts was caused by the derailment was the same condition from which she had suffered before the derailment occurred.

The Court: I will take that under advisement as that would take care of the entire case. [308]

State of Idaho,
County of Ada—ss.

I, G. C. Vaughan, hereby certify that I am the official Court Reporter of the United States District Court, in and for the District of Idaho; that I am the reporter who took the testimony and proceedings in the above entitled cause in shorthand and thereafter transcribed the same into longhand, and I further certify that the foregoing transcript consisting of 253 pages exclusive of this certificate, is a true and correct transcript of the testimony given

and the proceedings had in and about the trial of the said cause.

In Witness Whereof, I have hereunto set my hand, this 9th day of January 1942.

G. C. VAUGHAN [309]

[Title of District Court and Cause.]

ORDER AS TO ORIGINAL EXHIBITS

The defendant in the above entitled cause having appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment entered herein, and it appearing to the court that defendant's Exhibits 1, 8 and 9, consisting of a hospital chart and photographs respectively, should be inspected by the appellate court and sent to the appellate court in lieu of copies thereof.

It Is Hereby Ordered that the original defendant's Exhibits 1, 8 and 9 be sent to the appellate court in lieu of copies thereof, to be by such court held for inspection and used on the appeal taken by the appellant, and it is further ordered that upon completion of the use thereof by the appellate court that the same be returned to this court.

Dated, this 31st day of January, 1942.

CHARLES C. CAVANAUGH

District Judge

[Endorsed]: Filed Jan. 31, 1942. [312]

[Title of District Court and Cause.]

MINUTES OF THE COURT OF
OCTOBER 20, 1941

Nos. 1148-E and 1149-E.

These cases having been set for trial before the Court at this time, Messrs. Clyde Bowen, W. H. Witty and John Ferebauer appeared as counsel for the plaintiffs and Messrs. H. B. Thompson and L. H. Anderson appeared as counsel for the defendant.

A stipulation of counsel for the consolidation of the causes for the purpose of trial was presented. The Court signed order of consolidation and, upon agreement of counsel, designated the consolidated title of the causes as Albert G. Stanger and Phyllis Stanger against Union Pacific Railroad Company.

The consolidated causes then came on for trial before the Court. Upon request of plaintiffs' counsel, it was ordered that all witnesses in the cause be excluded from the court room until such time as they may be called to testify.

Albert G. Stanger, Dr. H. Ray Hatch, Phyllis Stanger and Dr. J. H. Lind were sworn and examined as witnesses on the part of the plaintiffs. The trial of the cause was continued to 10 o'clock A. M., October 21, 1941. [313]

[Title of District Court and Cause.]

MINUTES OF THE COURT OF
OCTOBER 21, 1941

This consolidated cause came on for further trial before the Court, with counsel for the respective parties present.

Albert G. Stanger was recalled and further examined as a witness for the plaintiffs, and here the plaintiffs rest.

George Orullion, Lee Walker, P. J. Lewis, Albert Gardner, Dr. C. M. Cline, Dr. Hoyt B. Woolley, Dr. W. W. Brothers and O. R. Nichols were sworn and examined as witnesses, and other evidence was introduced, on the part of the defendant.

Further trial of the cause was continued to 10 o'clock A. M. on October 22, 1941. [314]

[Title of District Court and Cause.]

MINUTES OF THE COURT OF
OCTOBER 22, 1941

The trial of this consolidated cause was resumed before the Court, with counsel for the respective parties present.

John H. Schroeder, C. R. Pflasterer and R. W. Savidge were sworn and examined as witnesses and other evidence was introduced on the part of the defendant, and here the defendant rests.

On rebuttal Albert G. Stanger and Phyllis Stanger were recalled and examined as witnesses on the part

of the plaintiffs, and here the plaintiffs rest and both sides close.

The defendant's counsel moved the Court for a dismissal of the complaints and the entry of judgment in favor of the defendant.

After hearing argument of counsel for the respective parties on the motion, the Court granted the plaintiff five days in which to file brief and the defendant the five days following. [315]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS
OF RECORD ON APPEAL

Comes now the defendant-appellant, Union Pacific Railroad Company, a corporation, and hereby designates the contents of the record, proceedings and evidence to be contained in the record on appeal of the above entitled cause to the United States Circuit Court of Appeals for the Ninth Circuit, as follows:

The complete record and all the proceedings and evidence in the action, including——

1. Complaint
2. Answer
3. Order of Removal (From the State Court to the United States District Court)
4. Opinion of the court dated December 6, 1941

5. Findings of Fact and Conclusions of Law
6. Judgment, with direction for entry thereof
7. Objections to Findings, and Motion to Amend Findings and Conclusions of Law and Motion to Strike, Amend and Substitute, together with the ruling of the court thereon, showing exception
8. Petition and Motion for New Trial
9. Order Denying Petition for New Trial
10. Notice of Appeal
11. Petition for approval of supersedeas and stay on appeal
12. Order Approving Bond and Granting Stay of Execution
13. Supersedeas Bond
14. Cost Bond on Appeal [316]
15. All testimony taken at the trial, the same being contained in the Reporter's Transcript, two copies of which are herewith filed with the Clerk of this Court
16. Exhibits numbered 1, 2, 8 and 9
17. Order of Court Transmitting original Exhibits 1, 8 and 9
18. All Court Minutes
19. Two copies of Reporter's Transcript
20. This Designation of Contents of Record, Proceedings and Evidence on Appeal, and Proof of Service.

Dated, this 3rd day of February, 1942.

GEO. H. SMITH

Attorney for Defendant-

Appellant,

Residing at Salt Lake City,
Utah.

H. B. THOMPSON,

L. H. ANDERSON,

Attorneys for Defendant-

Appellant,

Residing at Pocatello, Idaho.

Service of the foregoing Designation of Contents of Record on Appeal by receipt of a copy thereof is hereby admitted this 3rd day of February, 1942.

JOHN FEREBAUER,

CLYDE BOWEN,

Attorneys for Plaintiffs-

Appellees.

[Endorsed]: Filed Feb. 4, 1942. [317]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK OF UNITED
STATES DISTRICT COURT TO TRAN-
SCRIPT OF RECORD.

United States of America,

District of Idaho—ss.

I. W. D. McReynolds, Clerk of the District Court of the United States, for the District of Idaho, do hereby certify the foregoing typewritten pages

numbered 1 to 317, inclusive, to be a full, true and correct copy of so much of the record, papers and proceedings in the above entitled cause as are necessary to the hearing of the appeal thereon in the United States Circuit Court of Appeals for the Ninth Circuit, in accord with designation of contents of record on appeal of the appellant, as the same remain on file and of record in the office of the Clerk of said District Court, and that the same constitutes the record on the appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I Further Certify That the fees of the Clerk of this Court for preparing and certifying the foregoing typewritten record amount to the sum of \$35.00, and that the same have been paid in full by the appellant.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court, this 19th day of February, 1942.

(Seal)

W. D. McREYNOLDS,
Clerk.

[Endorsed]: No. 10063. United States Circuit Court of Appeals for the Ninth Circuit. Union Pacific Railroad Company, a corporation, Appellant, vs. Albert G. Stanger and Phyllis Stanger, Appellee. Transcript of Record. Upon Appeal from the Dis-

trict Court of the United States for the District of Idaho, Eastern Division.

Filed February 24, 1942.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

United States Circuit Court of Appeals for
the Ninth Circuit

No. 10063

UNION PACIFIC RAILROAD COMPANY, a
corporation,

Appellant,

vs.

ALBERT G. STANGER AND PHYLLIS
STANGER,

Appellees.

STATEMENT OF POINTS ON WHICH THE
APPELLANT, UNION PACIFIC RAIL-
ROAD COMPANY, INTENDS TO RELY
ON APPEAL, AND DESIGNATION OF
RECORD.

Comes now the appellant, Union Pacific Rail-
road Company, by its attorneys herein, and respect-
fully represents to this Honorable Court that in the
above styled and numbered cause it intends to rely
upon the following statement of points on appeal:

I.

That the evidence is insufficient to support a finding that the defendant was guilty of any negligence as charged in the complaint, for which reason the court erred in denying the defendant's motion for judgment and in making and entering findings of fact and conclusions of law and judgment in favor of the plaintiffs.

II.

The court erred in denying the defendant's motion for judgment, and its motion for new trial for the reasons set forth in paragraph I hereof.

III.

The court erred in holding and finding that the plaintiff Phyllis Stanger was in "reasonably good health prior to the accident", and erred in holding and finding that she was severely and permanently injured internally, and that she will continue to suffer nervously and/or physically in consequence thereof so long as she may live.

IV.

The court erred in holding and finding that the operation which was performed by Dr. Hatch on Phyllis Stanger in July, 1940, was necessitated by or because of injuries received by her at the time of or in the accident or derailment, and in basing his award of damages on such findings and assumption, without regard to her chronic ailment or disorder.

V.

The court erred in holding and finding that excessive flowing caused by the derailment necessitated

an operation which made Phyllis Stanger sterile, and in holding and finding that "the nervous shock and all of the personal injuries suffered and received by the said plaintiff Phyllis Stanger in said accident were due to and proximately caused by the negligence and carelessness of the defendant, its agents, servants and employes", and in assessing or awarding damages on that basis.

VI.

The court erred in holding and finding that the uterus of Phyllis Stanger was removed because of the injuries received by her at the time of the accident, or derailment, and that thereby she was caused to become sterile, through the fault or negligence of the defendant, and in assessing or awarding damages for the removal of said uterus and for sterility and for nervous and other injuries which he erroneously found to be permanent, without taking into account or making allowance for the chronic ailment or disorder with which she was afflicted.

VII.

The Court erred in refusing to strike paragraph VII of its findings of facts and substitute in lieu thereof the findings set forth in paragraph III of the defendant's objections to findings and motion to amend the same.

VIII.

Mrs. Stanger was suffering from chronic cervicitis and a fibrous uterus, the result of previous

child birth and infection, for the cure of which an operation was necessary and was performed which caused her to be sterile, and the defendant was not and is not liable therefor, and the court erred in failing, in rendering judgment, to take into account that said Phyllis Stanger had an established or chronic condition or disorder of her uterus and other related organs, which was the basic cause of her operation, and which it was necessary to operate upon to cure, and that the defendant could not lawfully be charged therewith, but for the consequences of which the court erroneously awarded and assessed damages against the defendant, without making allowance for said chronic or preexisting condition, as is more fully set forth in paragraph I (c) of the defendant's motion for new trial.

IX.

For the reasons stated in paragraph VIII hereof, the judgment is excessive and the evidence is insufficient to justify the decision and it is against law.

The appellant deems the entire record as filed to be necessary for the consideration of the contentions above enumerated.

Dated this 26th day of February, 1942.

Respectfully Submitted,

GEO. H. SMITH,

H. B. THOMPSON,

L. H. ANDERSON,

Attorneys for Appellant,

Union Pacific Railroad

Company.

Service of the foregoing, and receipt of a copy, this 26th day of February, 1942, is hereby acknowledged.

JOHN FEREBAUER,

CLYDE BOWEN,

Attorneys for Appellees.

[Endorsed]: Filed March 2, 1942. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

APPLICATION FOR ORDER DISPENSING
WITH PRINTING EXHIBITS

To the Honorable Judges of the Ninth United
States Circuit Court of Appeals:

The petition of the Union Pacific Railroad Company, a corporation, respectfully shows:

That an appeal has been perfected by your petitioner to this court from a judgment rendered in the United States District Court for the District of Idaho in a suit wherein Albert G. Stanger and Phyllis Stanger were plaintiffs, as more fully appears from the affidavit of H. B. Thompson hereunto attached and made a part hereof.

Also as appears from said affidavit three exhibits were received in evidence, numbers 1, 8 and 9, respectively, which are not of a printable type, numbers 8 and 9 being photographs, and number 1 being a hospital chart, the circumstances of their unprint-

ability and the grounds for this motion appearing more particularly in the annexed affidavit.

Wherefore, Your Petitioner Prays, for an order dispensing with the printing of said exhibits, the originals of which will be forwarded by the Clerk of the District Court to this court in due course of appeal.

UNION PACIFIC RAILROAD
COMPANY,

By GEO. H. SMITH,
H. B. THOMPSON,
L. H. ANDERSON,
Attorneys for Appellant.

So Ordered:

FRANCIS A. GARRECHT,
United States Circuit Judge.

[Title of Circuit Court of Appeals and Cause.]

State of Idaho,
County of Bannock—ss.

H. B. Thompson, being first duly sworn, deposes and says:

That he is one of the attorneys for the Union Pacific Railroad Company, appellant herein, and makes this affidavit on behalf of said appellant for the purpose of securing an order dispensing with the

printing of three exhibits in this case, defendant's exhibits 1, 8 and 9.

That judgment was rendered herein in favor of the plaintiffs against the defendant on December 24, 1941, and that on December 31st, 1941, the defendant perfected an appeal to this court by filing an original and copy of notice of appeal and undertaking on appeal, and has since served and filed the additional papers required by the Rules of Court.

That on December 31, 1941, the District Judge, Honorable Charles C. Cavanah, made an order for the originals of the aforesaid exhibits to be forwarded to this court with the record on appeal. Said exhibits are not of a printable type because exhibits numbered 8 and 9 are photographs of the core or body of the wheel of a railroad car, exhibit numbered 1 is a hospital record of the plaintiff Phyllis Stanger, consisting of twenty-three pages on printed forms, consisting of patient's admittance record, case history, operation record, graphic chart of temperature, nurses record, with printing and writing on both sides of portions thereof. Some of the writing is disputed between counsel, and some of it is difficult to decipher, and if the clerk of the court were to have it printed he might have to decide disputed questions. Deponent further says that he has requested opposing counsel to join in a stipulation for the relief herein sought, but opposing counsel

have declined so to do, upon the ground that said exhibit was received over their objection.

H. B. THOMPSON.

Subscribed and sworn to this 26th day of February, 1942.

(Seal)

ROSA ENKE,

Notary Public for Idaho,

Residing at: Pocatello, Idaho.

[Endorsed]: Filed Mar. 2, 1942. Paul P. O'Brien,
Clerk.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

UNION PACIFIC RAILROAD COMPANY,
a corporation,

Appellant,

vs.

ALBERT G. STANGER AND PHYLLIS STANGER,

Appellees.

BRIEF OF APPELLANT

Appeal from the District Court of the United States for the
District of Idaho, Eastern
Division.

FILED

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IN THE
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FOR THE NINTH CIRCUIT

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OPINION BELOW

The opinion of the district court is not reported but may be found in the record at pages 12-16.

JURISDICTION

This suit was instituted in the Fifth Judicial District Court of the State of Idaho, in and for Bannock County, July 16, 1941 (R. 1-8) by Albert G. Stanger and Phyllis Stanger, his wife, residents of the State of Idaho (R. 70, 136) to recover \$50,000.00 damages (R. 6) against the Union Pacific Railroad Company, a corporation of the State of Utah (R. 1), for personal injuries alleged to have been sustained in a train derailment in the State of Colorado, and on August

7, 1941, an order was made by the District Judge for the removal of the case to the United States District Court for the District of Idaho, Eastern Division (R. 11). The jurisdiction of the District Court was based upon Section 24 of the Judicial Code as amended, 28 U. S. C. A. Sec. 41. The case went to trial October 21, 1941, before Hon. Charles C. Cavanah, sitting without a jury, and after the evidence had been received the case was taken under advisement (R. 302) and the court rendered its opinion December 6, 1941, awarding judgment in favor of the plaintiffs in the sum of \$19,000.00 (R. 12, 15). Judgment for that amount was entered December 24, 1941, (R. 28-29). Notice of appeal was filed January 31, 1942, (R. 53). The jurisdiction of this court is invoked under Section 128 of the Judicial Code, as amended, 28 U. S. C., Sec. 225 (a).

QUESTIONS PRESENTED

The questions presented are (1st) whether, under the pleadings and the evidence the defendant was liable, and (2nd) whether the court did not erroneously embrace in his award damages, and elements of damage, for which the defendant was not liable.

STATEMENT

There were two cases brought, one by Albert G. Stanger for injuries he claimed to have been sustained by him, and another by Albert G. Stanger and Phyllis Stanger for injuries claimed to have been sustained by Phyllis Stanger in a train

derailment near Denver, Colorado in January, 1940 (R. 3). These two cases were consolidated for trial and tried under the title in the last mentioned case, No. 1149 (R. 16, 69). The court found against Albert G. Stanger in his case, No. 1148, (R. 22-23) and in favor of the plaintiffs-appellees in case No. 1149 in the sum of \$19,000.00 for injuries asserted by Phyllis Stanger (R. 26-29).

Objections to findings of fact and conclusions of law (R. 29-43) and Petition and Motion for new trial based upon insufficiency of the evidence to support certain findings and conclusions, errors of law, and excessive damages (R. 45-51) were filed, argued and submitted. The objections to findings were granted only partially (R. 43-44) and the petition and motion for new trial was, by the court, denied (R. 52). As heretofore stated the defendant has appealed (R. 52-67).

APPELLEES TESTIMONY

The appellees live at Idaho Falls, Idaho, and on the 13th day of January, 1940, left Idaho Falls on one of appellant's trains for Houston, Texas (R. 70-71). The next morning at a point about 30 miles from Denver, Colorado, the car in which plaintiffs were riding was derailed (R. 74). They were riding in a standard sleeping car (R. 120), Mr. Stanger was riding with his back to the front of the train and Mrs. Stanger was directly opposite him facing forward. A regular Pullman table was between them and they were playing cards with two men (R. 75). The train at the time of derailment was traveling about 65 miles per hour (R. 77). After the derailment the car in which they were riding came to rest at an angle

beside the track or in a barrow pit (R. 78). The weather was cold and there was snow on the ground (R. 79). They got out of the Pullman car and went to a parallel highway and obtained a ride into Denver, and at the Pullman car Mrs. Stanger started to flow (R. 80). They met friends at Denver who called a Doctor to give them aid (R. 81). What kind of treatment was given is not shown. Mrs. Stanger claimed the card table struck her in the abdomen (R. 137), but Dr. Hatch said the female organs were low in the body and behind the pelvic and pubic bones (R. 101). In other words they were protected and couldn't have been directly injured by the table which was $10\frac{1}{4}$ inches above the seat (R. 268). They left Denver that night at about 8 o'clock, going by train to Houston, Texas, where they attended a convention for three days, after which they went to Mexico City where they traveled about for three days sightseeing, and then returned to Idaho Falls January 29th or 30th. Mrs. Stanger went to Dr. Hatch on February 12, 1941 (R. 95, 117, 119, 146-147). While at Denver they had dinner with friends, went to the Horse Show and then had dinner at the Athletic Club, after which they went to board the train for Houston, Texas (R. 146).

Mrs. Stanger testified on direct examination that for three months prior to the trip her condition was better than it had been for a long time and that about three months before she left she had been to a Doctor because her period "which was normally four days had gone into about a seven day period" (R. 143). She said she went to Dr. Wooley for treatment because her periods were running into seven or eight days (R. 147). This was November 10, 1939 (R. 216), and since

the birth of her last child had had excessive flowing or longer than her normal period, which she said was about a week instead of four days (R. 148). The youngest child was two years of age at the time of the trial October 20, 1941 (R. 148), about one year old on February 12, 1940 (R. 102). Dr. Hatch treated her for the uterus bleeding (R. 95) and when she did not respond to treatment he operated on her to remove the bleeding uterus on July 9, 1940 (R. 96). In June she had gone to Fresno, Cal. and return on an automobile trip (R. 157). She did not bleed after the operation (R. 142-143). In the operation he removed the uterus and the womb, the right ovary and did a conization of the cervix and removal of the lining of the neck of the womb (R. 97). The uterus was fibrous and that was removed to stop the bleeding (R. 99). He had a history of her having this bleeding following child birth and prior to January, 1940 (R. 102). She told him she had been to other doctors for similar treatment (R. 103). The ovary removed had multiple follicular cysts (R. 105). The doctor had performed several such operations on women who had never been in a train wreck (R. 116). The pathological reports disclosed a well developed chronic condition of fibrous uterus and chronic cervicitis (R. 100-101).

APPELLANT'S TESTIMONY

This derailment occurred about 37 miles from Denver at a place called Houston, Colorado, on the main line between Omaha, Nebraska and Denver, Colorado. This particular train ran from Cheyenne, Wyoming, to Denver and connected

with the Omaha-Denver main line at LaSalle (R. 179). The train consisted of eight cars, the mail car, two baggage cars, a coach, Pullman tourist, another coach, a Pullman standard and a cafe lounge car (R. 267). The Stangers were riding in the Standard Pullman—next to the last car in the train.

Traveling through Houston the train was moving at 60 or 65 miles per hour (R. 181), which was the normal running time, and nothing unusual was observed or noticeable on the engine as it passed through Houston (R. 182). The engineer was first apprised that something was wrong when the air brakes were applied in emergency due to the train parting. When the train stopped he went back and found that four cars only were attached to the engine and all on the rails, and found a broken wheel on the right rear truck of the fourth or rear car (R. 180-181). Three or four of the rear cars were derailed (R. 183). The wheel was broken in several pieces—only the web of the wheel was on the axle (R. 185).

The road bed consisted of Sherman gravel of eight inches or better under the ties—good treated ties, tie plates and 110 pound rail thirty-nine feet sections laid in 1932 (R. 192). Inspection disclosed that at a point 19 or 20 feet east of the frog and near the center of the switch there was a place about one-half inch, on the top of the rail as if something had been pounded into it. There was nothing west of there, but 16 feet east of the frog the rail was torn out and broken, caused by the broken wheel. Inspection of the track west of the frog disclosed no evidence of anything which had been dragging and no evidence of any defect that could have caused the

wreck (R. 191). This accident occurred on Sunday (R. 189), and on Saturday, the day before the accident, this switch and track were inspected and found to be in perfect condition (R. 192). From the time of this inspection up to the time of the derailment trains had passed over this part of the track. The gauge of the track was perfect (R. 196-197). The four cars behind the engine were inspected and nothing found to be missing or defective except a broken wheel on the right rear truck. About 16 inches of the plate of the wheel was left on the axle (R. 266). The breaks of the wheel were all new breaks (R. 267, 263, 289). There was nothing broken inside the Pullman car, and measurements disclosed that there is a free height of $10\frac{1}{4}$ inches from the top of the seat to the top of the card table. All of the seats and backs were cushioned (R. 268). All the broken parts of the wheel were located, picked up, packed and shipped to Dr. Barr at Omaha (R. 263-264), and all of the broken parts fit the part of the plate left on the axle (R. 264). When these parts together with the part of the plate left on the axle were received by Dr. Barr at Omaha a metallurgical test of the wheel was made to determine what caused it to break (R. 277). The wheel broke due to internal stresses that developed during the manufacture of the wheel (R. 286). These stresses, or the thing which caused the wheel to break, could not be discovered by any kind of inspection and could not be found "without cutting the wheel up" (R. 288). The thing that caused the wheel to break was in it when it left the mill, it developed during the manufacture (R. 291). This wheel was manufactured in 1928, and there are thousands of the same kind in operation on the Union

Pacific Railroad and also on other railroads, and since 1912 there have been but two wheels break from such causes (R. 289-290). The breaks were all new breaks; nothing was found on the broken parts to cause it to break; the breaks were bright and shiny; the wheel had recently been turned (R. 289), and there had been no friction heat produced which would or could have caused the wheel to break (R. 294). A chemical analysis was also made of the wheel and it was found to conform to all standards (R. 294-296).

Dr. Hoyt B. Wooley had graduated at Illinois Masonic Hospital in 1932, and who had been admitted to practice in the State of Idaho for eight years (R. 216), referred to his office record which was made by him at the time of Mrs. Stanger's visits (R. 236) and testified that the first professional services which he rendered to her was on November 10, 1939 (R. 216). On that date she stated to him that for the past four years she had been flowing from eight to ten days twice a month—large clots, backache, cramps in the groin before menses and during menses, run down most of the time and had been taking iron preparation; her last menstrual period extended from October 28 to November 9th, the last five days much darker than usual; blood count 42% hemoglobin (R. 219). Treatment instituted was intermuscular injection of astrone, with elixir before meals. Her last visit to him prior to January 1, 1940, was December 14, 1939, at which time she told him that she and her husband were leaving on a trip and that when she returned she would be back to see him (R. 220). Did not think she was cured at any time (R. 221). Did not examine her on December 14,

1939 (R. 222). [Mrs. Stanger says he couldn't because of her flowing (R. 149)]. Dr. Wooley inspected the pathological report, defendants' Exhibit 1, (R. 221). The pathological report, which fitted in with the doctor's findings, was made by Dr. Daines of tissue from the uterus, cervical tissue, and analyzed as fibrosis uteri with diffuse endometrial hyperplasia, chronic fibrous cervicitis, multiple follicular cysts of the ovary with corpus hemorrhagicum. The diagnosis of fibrous uteri with diffuse endometrial hyperplasia could be ascribed to the history which Mrs. Stanger gave to Dr. Wooley at the time of his examination (R. 224). Taking into account the pathological diagnosis of the tissue removed at the time of the operation and its analysis together with the examination made by Dr. Wooley and the history which Mrs. Stanger gave him it was his opinion that she was not cured when she last called upon him, December 14, 1939 (R. 225). She did not call at his office or send for him after that date. Speaking of the condition that brings about such disorders as Mrs. Stanger had when she came to him, the Doctor said the condition of the uterus which was fibrous was a condition that occurs over a period of time and is of a chronic nature. Hyperplasia endometrial is a condition in which the lining of the uterus which normally is sloughed off at each menstruation is much thicker than normal, because of the increase in size and thickness, the increase in vascularity causes the flow to be continued and causes, or because of the replacement of muscle tissue by fibrous tissue does not permit the uterus to contract, thus bringing about a continuation of the flowing (R. 226). Chronic fibrous cervicitis is a condition very similar to the fibrous con-

dition you have in the uterus only it exists in the cervix or the mouth of the uterus, it is a condition of the replacement of normal cervical tissue with fibrous tissue, and chronic means a condition lasting over a period of time, months or possibly a year. Assuming a patient who has a flowing condition such as Mrs. Stanger described to Dr. Wooley, with pathological report showing fibrosis uteri and chronic fibrous cervicitis, it was the doctor's opinion that the excessive flowing was caused by the fibrous condition of the uterus and hyperplastic condition of the endometrium (R. 227-228, 243). The surgical remedy is to remove the uterus (R. 226); ultimately to effect a complete cure surgery is necessary (R. 244). With fibrous uteri with hyperplasia endometrium you would have excessive flowing in all cases (R. 233). The examination made by Dr. Wooley on November 10, 1939, was a check up as to her physical condition, excluding a pelvic examination; she had been flowing from the 28th of October until the day before she came to his office (R. 233). When Mrs. Stanger told Dr. Wooley that for the past four years she had flowed eight to ten days twice a month he interpreted that to mean during the period that pregnancy was not present (R. 235). The "shots" which the Doctor gave to Mrs. Stanger had a beneficial effect (R. 237). Patients respond to such treatment for varying periods of time, and then there comes a time when they do not respond to that treatment (R. 238). A rise of hemoglobin from 42% to 68% would be an improvement (R. 239), but Mrs. Stanger was not cured December 14, 1939 (R. 240). Mrs. Stanger did not dispute Dr. Wooley's testimony except to the extent of asserting that on November 10,

1940 (1939), (at the time she was in the office of Dr. Wooley) she did not state to him that her period of flowing had been and was for a period of eight or ten days twice a month or that she had flowed excessively during the past four years (R. 300), but asserted that she went to him for the purpose of "checking the flow" (R. 301).

Dr. W. W. Brothers, a licensed physician and surgeon since November 1919, whose practice consisted mostly of surgery and surgical diseases of women particularly (R. 246), examined Mrs. Stanger at Idaho Falls October 9, 1941, at which time she stated that she first began excessive menstruation following the birth of the last baby two years previously. Dr. Hatch was present at the time of the examination (R. 247). Dr. Brothers read the pathological report of the tissue removed and talked to Dr. Hatch, and that together with the history formed his impression of the condition. His impression was that she had suffered for some time from fibrosis of the uterus, chronic cervicitis, inflammation of the cervix and hyperplasia of the endometrium, that this condition improved somewhat but got worse, but after the operation she was satisfactorily improved. The main symptoms of fibrous uterus, or fibrosis uteri are excessive menstruation followed by anemia, all the symptoms of anemia such as nervousness and weakness; anemia is secondary to loss of blood; she lost too much blood, more than she could replenish (R. 249). Fibrosis uteri and the other conditions referred to may be treated with injections which are not so satisfactory but might give temporary relief, and small doses of radium, which is quite effective, and X-ray treatment and surgery such as was

done in this case (R. 250). Assuming the history given by Mrs. Stanger of excessive menstruation following the birth of her last baby about two years previous to the time of trial, Dr. Brothers attributed the excessive flowing to hyperplasia of the endometrium and fibrosis of the uterus, and it was his opinion from his examination and the history that he had received that the operation such as Dr. Hatch performed would ultimately be necessary (R. 251). If Mrs. Stanger had been treated by some other treatment by the giving of shots, and had responded and her hemoglobin built up from 42% to 68% over a period of thirty days she could have been relieved but would not expect a cure. Usually find excessive flowing where the uterus has become fibrous (R. 252). Excessive flowing by physical violence or injury is not caused unless there is a direct injury to the organ; do not think there could be enough violence or force applied to the outside surface to produce excessive menstruation—not unless there was some pathological condition not in a normal uterus. In a uterus that is not normal it might increase the flow for a time (R. 257), but it would be temporary and should clear up within a few days (R. 258). Assuming severe nervous shock, that might increase the flowing to some extent but that would be temporary (R. 257-258, 259), it would be rather minor. If she went to bed and rested she would probably get over that in a few days (R. 259).

Dr. Miller, who was the family physician and who attended Mrs. Stanger upon the birth of her last child (R. 147) was not called to treat her upon her return to Idaho Falls and was not called as a witness.

In June, 1940, Mr. and Mrs. Stanger drove by automobile from Idaho Falls to Fresno, California, and return, being gone about ten days (R. 157). She was operated on July 9, 1940 (R. 96).

SPECIFICATION OF ERRORS

I.

The evidence is insufficient to support a finding that defendant was guilty of any negligence as charged in the complaint, for the reason that plaintiffs did not offer or introduce any evidence of negligence but relied entirely on an inference of negligence arising from the derailment of the train and defendant's evidence completely rebutted any inference of negligence by establishing without dispute that the track and roadbed were in good condition, that there was no defect in the passenger equipment but that the derailment was caused by a broken wheel resulting from internal stress which was latent and could not have been found or discovered by any kind of inspection prior to the time it broke. (See paragraph I (a) and (b) of petition and motion for new trial (R.45-46) .) For all of which reasons the court erred in denying defendant's motion for judgment and in making and entering findings of fact and conclusions of law and judgment in favor of the plaintiffs. (R. 302, 12-16, 16-28).

II.

The court erred in denying defendant's motion for judgment (R. 301-302), in denying defendant's motion to amend findings of fact and conclusions of law (R. 29-43), and in denying defendant's motion for new trial (R. 45-51), for

the reasons set forth in specification I and for reasons set forth in the following specifications, and, in rendering his decision, in proceeding upon the assumption that the burden was on the appellant to establish that the train wreck was not caused by any negligence on its part (R. 14).

III.

The court erred in holding and finding that the plaintiff Phyllis Stanger was in "reasonably good health" prior to the accident, and in basing his award of damages on such assumption, because it was established by the evidence that she had suffered from excessive and prolonged menstruation or flowing ever since the birth of her last child, about ten months previous to the derailment, for the alleviation or cure of which she had been doctoring and was not cured, and that the condition from which she was so suffering was a chronic disorder caused by child birth infection to her uterus and cervix and other organs (R. 21).

IV.

The court erred in holding and finding that the plaintiff Phyllis Stanger was severely and permanently injured internally, and in basing his award of damages on such assumption, because the evidence is insufficient to support such finding, but on the contrary it was established by the evidence that she was suffering from a chronic female disorder prior to and at the time of the derailment in which she claimed to be so injured, for the complete and ultimate cure of which an operation was necessary and would be performed. Furthermore it

was established by the undisputed evidence that whatever nervous shock or menstruation or flowing resulted from or were occasioned at the time of the derailment were neither serious nor permanent nor were they the cause of her subsequent operation (R. 19).

V.

The court erred in holding and finding that the plaintiff Phyllis Stanger would continue to suffer nervously and/or physically in consequence thereof as long as she might live, and in basing his award of damages on such assumption, for the reasons assigned in the preceding assignment of error and because it was established by the evidence without dispute that since the operation which was performed on the said Phyllis Stanger July 9, 1940, she had experienced a speedy and marked recovery both nervously and physically and the evidence is wholly insufficient to support a finding that she will not completely recover both nervously and physically within a brief space of time. (R. 26).

VI.

The court erred in holding and finding that the operation which was performed by Dr. Hatch on Phyllis Stanger in July, 1940, was necessitated by or because of injuries received by her at the time of or in the accident or derailment and in basing his award of damages on such finding and assumption without regard to her chronic ailment or disorder for the reasons specified in the two preceding assignments of error (R. 20, 21).

VII.

The court erred in holding and finding that excessive flowing caused by the derailment necessitated an operation which made Phyllis Stanger sterile, and in holding and finding that the "nervous shock and all of the personal injuries suffered and received by said Phyllis Stanger in said accident were due and proximately caused by the negligence and carelessness of the defendant, its agents, servants and employees," and in assessing or awarding damages on that basis for the reasons assigned in specification of errors III and IV herein preceding (R. 22).

VIII.

The court erred in holding and finding that the uterus of Phyllis Stanger was removed because of the injuries received by her at the time of the accident or derailment and that she was caused to become sterile through the fault or negligence of the defendant and in assessing or awarding damages for the removal of said uterus and for sterility and for nervous and other injuries which he erroneously found to be permanent without taking into account or making allowance for the chronic ailment or disorder with which she was afflicted, for the reasons assigned in specifications of error III and IV herein preceding (R. 22).

IX.

The court erred in refusing to strike paragraph VII of its findings of fact (R. 20) and substitute in lieu thereof the findings set forth in paragraph III of defendant's objections

to findings and motion to amend the same (R. 30), because it is not true and the evidence is not sufficient to support a finding that at the time the surgical operation was performed upon Phyllis Stanger her uterus was removed "because of the said injuries received at the time of the accident" and the resultant excessive flowing and the removal of her uterus thereby making her sterile, and for the reasons assigned in the defendant's aforesaid specification of error III (R. 30-34).

X.

Mrs. Stanger was suffering from chronic cervicitis and a fibrous uterus, the result of previous child birth and infection, for the cure of which an operation was necessary and was performed which caused her to be sterile, and the defendant was not and is not liable therefor, and the court erred in failing, in rendering judgment, to take into account that said Phyllis Stanger had an established or chronic condition or disorder of her uterus and other related organs, which was the basic cause of her operation, and which it was necessary to operate upon to cure, and that the defendant could not lawfully be charged therewith, but for the consequences of which the court erroneously awarded and assessed damages against the defendant, without making allowance for said chronic or preexisting condition, as is more fully set forth in paragraph I (c) of the defendant's motion for new trial (R. 46-47, 48), and for the same reasons erred in denying said motion for new trial.

XI.

For the reasons stated in paragraph X hereof, the judg-

ment is excessive and the evidence is insufficient to justify the decision and it is against law (R. 45-48, 52).

ARGUMENT

I.

Under this point will be discussed the negligence phase of the case. It is our contention that the court erred (1) in failing to grant appellant's motion for judgment, (R. 301-302); (2) in failing to grant appellant's motion to amend findings and conclusions of law, (R. 29-43), and (3) in failing to grant appellant's petition and motion for new trial (R. 45-51). The facts and the law will be discussed (Errors I and II).

Appellant conclusively rebutted any inference of negligence arising from the fact of derailment.

The issue concerning negligence was made by appellees in paragraph V of their complaint. It is that "by reason of the defective equipment, roadbed, and tracks, said train derailed and left the tracks." (R. 3)

The track and roadbed were in perfect condition, it having been properly maintained, and inspected the day before the derailment (R. 192). The engine of this train and four cars were not derailed (R. 181), and trains passed over this track subsequent to the section foreman's inspection on Saturday and up to the time the derailment occurred (R. 196). Leaving for consideration only whether there was any negligence on the part of the appellant with reference to the equipment. As

a matter of fact the court found that Mrs. Stanger suffered injuries as a result of the carelessness and negligence of the defendant, its servants, agents and employees "in failing in their duty of inspection of the passenger cars and equipment prior to the time the said accident occurred" (Finding IX R. 22). It was then found by way of argument in Finding XIII (R. 25) that defendant's evidence failed to rebut the inference of negligence with reference to the "inspecting, maintaining, managing and operation of its passenger equipment." *Findings IX and XIII are not supported by the facts in the record.*

The train was being operated at the usual and customary speed. The usual station stops were made between Cheyenne and the point of derailment, and nothing unusual was noticeable as the engine went over the track where the rear of the train derailed (R. 182). As pointing to the fact that the broken wheel caused the derailment it is significant to note that the four rear cars were derailed and the four head cars and engine were not (R. 180-181, 266). Also, that about 19 or 20 feet east of the frog of the east switch at Houston there was a flat place or nick in the top of the rail, as if something had been pounded into the top of the rail, and then about 16 feet further east the rail began to break. The section foreman concluded the rails broke because of the broken wheel (R. 191). That is the only conclusion that can be reached. The track and roadbed were in perfect condition. The frog was not damaged and is still in service (R. 196). Further, with reference to the equipment, Mr. Schroder, the general car foreman, inspected the four cars behind the engine and found no parts of any

of these cars missing, and found no parts along the track. The only thing he found which was not normal, was the broken wheel on the right rear truck of the fourth car behind the engine (R. 266-267) ; all derailed cars derailed to the right (R. 194). This brings us then to the broken wheel—the only cause of the derailment. The next inquiry then is, (1) why did the wheel break, and (2) could the thing which caused it to break have been discovered by any kind of inspection?

(1) “This wheel broke due to internal stress that are locked up in the plate that develop during the manufacture.” To determine this the wheel was cut or sawed through the hub and through the plate. “In the construction of the wheel the outside portion is a heavy mass and the hub is a heavy mass, the plate is thin and unless it is control cooled these stresses set up, and they were there” (R. 286). The wheel broke suddenly. This is definitely established by the fact that all the broken parts were bright and shiny and all were new breaks. Breakage from internal stress is very rare. There have been but two breaks in the past thirty years, notwithstanding the fact that there are thousands of this same type of wheel in use on appellant’s line, and all over the country. The same type of wheel is used by other railroads, made by the same mill and the same specifications (R. 289-290). All railroads purchase wheels under the A. R. A. (American Railway Association) specifications (R. 286-287), and this wheel met the specifications (R. 294-296).

(2) As to whether the stresses that caused the wheel to break could be found or discovered by any observation or

inspection, the witness said: "No way to find them without cutting the wheel up" (R. 288).

Appellees merely offered testimony showing the derailment and then made an attempt to show injuries as a result of the derailment. The court found Mr. Stanger was not injured, but that Mrs. Stanger was. So far as the negligence phase is concerned appellees offered no evidence and the testimony in that regard given by appellant's witnesses stands undisputed, and was not shaken or discredited in any manner by cross-examination.

Every inference of negligence that can possibly be drawn from the fact of the derailment, was thoroughly and conclusively rebutted. The only issue relates to the equipment and, as the evidence shows, all of the equipment which could have caused the derailment was found to be intact, except for the broken rear wheel on the rear car (R. 266), and nothing was found along the track either east or west of the frog or switch that could have caused the derailment (R. 190). When a portion of the wheel was cut out the etching established a clean, dense structure, showing no defects in the plate area (R. 277-278).

Under the facts in this case there was no negligence.

Appellant's duty under the law is well stated in Hutchinson on Carriers, 3rd Ed. Sec. 903, 904, p. 1010 as follows:

"Where the accident arises from a hidden and internal defect, which a careful and thorough examination would not disclose and which could not be guarded

against by the exercise of a sound judgment and the most vigilant oversight, then the proprietor is not liable for the injury but the misfortune must be borne by the sufferer as one of that class of injuries for which the law can afford no redress in the form of a pecuniary recompense."

In 3 Cooley on Torts, (4th Ed.) Sec. 480, p. 375, the author says:

"Thus there is a presumption of negligence when a passenger is injured by the derailing of his train, or by a collision or other accident to the car in which he is riding. *But this rule of evidence is not conclusive. The carrier may rebut the presumption and relieve himself from responsibility by showing that the injury arose from an accident which the utmost skill, foresight, and diligence could not prevent.*" (Italics ours)

There is no case which sets the duty of care on the part of the appellant higher than "human foresight."

Gleeson vs. Va. Midland Ry. Co., 140 U. S. 435,
443, 35 L. Ed. 458,

and

"* * * if the cause of the injury was one which it could not have foreseen and guarded against, it was not culpable."

San Juan Light T. Co., vs. Requena, 224 U. S.
89, 98, 56 L. Ed. 680.

The court in the last case, in discussing the doctrine of *res ipsa loquitur*, said:

“* * * when a thing which causes injury, without fault of the injured person, is shown to be under the exclusive control of the defendant, and the injury is such as, in the ordinary course of things, does not occur if the one having such control uses proper care, it affords reasonable evidence, in *the absence of an explanation*, that the injury arose from the defendant's want of care.” (Italics ours)

The appellant is not an insurer of the safety of passengers, it is liable only for negligence.

Kitsap County Transportation Co., vs. Harney,
(9th Cir.) 15 Fed. (2d) 166;

Waller vs. Southern Pacific Co., (D. C. Cal.) 37
Fed. Supp. 475;

Boucher vs. Boston & M. R. Co. (N. H.) 79 Atl.
993;

Hines vs. Beard (Va.) 107 S. E. 717.

But the decision of the court in this case and the findings made, imposed a duty on appellant far beyond which any court has ever gone. Even though the internal stress in the wheel, which caused it to give way and break, could not have been discovered by any human skill or foresight, the court held that appellant was negligent for failing to discover this by prior inspection. The only evidence on the matter is that it could only be discovered by sawing or cutting the wheel as the witness Pflasterer did after the accident. To comply with the rule applied by the trial court would require railroad companies to saw or cut up every wheel it purchased before it put them into service. That is the only method by which the thing

that caused the wheel to break could be found. To comply with such a rule would be nothing short of imposing on carriers absolute insurance of safety, which, of course, is not the law.

The trial court in his opinion stated that the law required appellant to "exercise the utmost care and diligence or the highest degree of care and prudence and foresight for the passengers' safety," yet in the face of all of the uncontradicted and unimpeached testimony held that appellant had not done that (R. 13).

Not only that, but the court seemed to labor under the impression that it was the duty of appellant to carry the burden of proving that it was not negligent, for the court said:

"This duty was upon the defendant when it accepted passengers and when we apply the doctrine of *res ipsa loquitur* it was upon the defendant to explain, *which it did not*, as stated, *that the train wreck was not caused by any negligence on its part.*" (R. 14) (italics ours)

Under the doctrine of *res ipsa loquitur* the plaintiff is not relieved of the burden of proof, and all the defendant is called upon to do is to produce exculpatory evidence of equal weight and in such cases the plaintiff fails if the force of the maxim is counterbalanced by the facts disclosed.

Scellars vs. Universal Service Everywhere, (Cal.)
228 Pac. 879;

Humphrey vs. Twin States Gas & Elec. Co., (Vt.)
139 Atl. 440, 56 A. L. R. 1011;

Briglio vs. Holt and Jeffery (Wash.) 147 Pac. 877.

The same rule of law has been recognized and established by the United States Supreme Court in *Sweeney vs. Erving*, 228 U. S. 233, 240, 241, 57 L. Ed. 815. In that case the court said:

“In our opinion, *res ipsa loquitur* means that the facts of the occurrence warrant the *inference of negligence, not that they compel such an inference.*”
(italics ours)

The court in the above case, in quoting with approval from a New York decision, said:

“* * * but when the proof was all in, the burden of proof had not shifted, but was still upon the plaintiff * * *. If the defendant’s proof operated to rebut the presumption upon which the plaintiff relied, or *if it left the essential fact of negligence in doubt and uncertainty, the party who made that allegation should suffer, and not her adversary.* * * *” (italics ours)

The only thing the appellees can claim for the doctrine of *res ipsa loquitur* is that the fact of accident raises an inference of negligence. This inference, of course, is a rebuttable one, and the burden remained throughout the trial upon the appellees to establish negligence by a preponderance of the evidence, and the appellant having explained the cause of the accident and rebutted every inference of negligence, appellees case failed because there was no evidence of negligence. The situation is the same as that which arose in the case of *Pennsylvania R. Co., vs. Chamberlain*, 288 U. S. 333, 77 L. Ed. 819, wherein the court said:

“And the desired inference is precluded for the further reason that respondent’s right of recovery depends upon the existence of a particular fact which must be inferred from proven facts, *and this is not permissible in the face of positive and other uncontradicted testimony of unimpeached witnesses consistent with the facts actually proved, from which testimony it affirmatively appears that the facts sought to be inferred did not exist.*” (italics ours)

The court cites a great number of authorities to support this statement and specifically refers to the 8th Circuit Court case of *Wabash R. Co., vs. DeTar*, 141 Fed. 932, and says that a rebuttable inference of fact

“must necessarily yield to credible evidence of the actual occurrence.”

The court also approved a statement by the Missouri Court as follows:

“It is well settled that where plaintiff’s case is based upon an inference or inferences, that the case must fail upon proof of undisputed facts inconsistent with such inference.”

In the *Chamberlain* case the court reaffirms the statement that the scintilla rule has been definitely and repeatedly rejected so far as the Federal Courts are concerned, and also lays down the well known rule for directing verdicts.

In a recent decision of the United States Supreme Court it was held that a plaintiff had not carried the burden of proof of establishing that a vessel was unseaworthy. *Commercial*

Molasses Corp., vs. New York T. B. Corp., 86 L. Ed. 125 (adv. op.). The court said:

“This is but a particular application of the doctrine of *res ipsa loquitur*, which similarly is an aid to the plaintiff in sustaining the burden of proving breach of the duty of due care *but does not avoid the requirement that upon the whole case he must prove the breach by the preponderance of evidence.* *Sweeney vs. Erving*, 228 U. S. 233, 57 L. Ed. 815, 33 S. Ct. 416, Ann. Cas. 1914 D. 905.” (italics ours)

It was not necessary to entitle appellant to a judgment that the cause of the derailment be established beyond reasonable doubt. If appellant's evidence raised only an equipoise, that was sufficient and it was entitled to judgment as a matter of law.

New York Cent. R. Co., vs. Johnson (8 Cir.) 27 Fed. (2d) 699;

Chesapeake & O. Ry. Co., vs. Baker, (Ga.) 143 S. E. 299;

McClaskey vs. Koplal (Mo.) 46 S. W. (2d) 557, 92 A. L. R. 641, 650;

Omaha Street R. Co., vs. Boesen (Neb.) 105 N.W. 303, 4 L. R. A. (NS) 122, 129;

Hughes vs. Atlantic City S. R. Co., (N.J.) 89 Atl. 769, LRA 1916 A.-927;

Bollinbach vs. Bloomenthal (Ill.) 173 N. E. 670.

The trial court could not ignore appellant's testimony.

The court could not legally ignore appellant's testimony, but this the court did, otherwise appellant would have had judgment. There was nothing in the testimony of any of appellant's witnesses which was not credible. There was "no lack of candor" on their part and "it was not shaken by cross examination. * * Its accuracy was not controverted by proof of circumstances," and "there is nothing in the record which reflects unfavorably upon his (their) credibility. The only possible ground for submitting the question to the jury as one of fact was that the witness was an employee of the petitioner. In the circumstances above detailed, we are of opinion that this was not enough to take the question to the jury and the court should have so held."

Chesapeake & O. R. Co., vs. Martin, 283 U. S. 209, 216.
See also:

Penna. R. Co., vs. Chamberlain, 288 U. S. 333,
339;

Edward vs. W. U. Tel. Co., 45 N. Y. 553, 6 Am.
Rep. 140.

To hold in favor of appellees the court had to ignore Pflasterer's testimony, when in testifying about finding the stress which caused the wheel to break, he said "no way to find them without cutting the wheel up" (R. 288).

"* * * their's being the only testimony on the point, disbelief of the testimony cannot supply a want of proof."

Bunt vs. Sierra Butte Gold Min. Co., 138 U. S. 483.

It is only when the facts ^{are} ~~are~~ the reasonable inferences to be drawn from them are in dispute that a question is made for the jury in a res ipsa loquitur case.

The foregoing statement is fully supported by the authorities.

Dierks Lumber & Coal Co., vs. Brown (8 Cir.)
19 F. (2d) 732, 737;

St. L. & S. F. R. Co., vs. Gleaves (5 Cir.) 294 Fed.
523;

Holland vs. Dir. Gen., (3 Cir.) 273 Fed. 928;

Woodward vs. C. M. St. P. R. Co., 145 Fed. 577;

Gray vs. B. & O. RR Co., (7 Cir.) 24 Fed. (2d)
671;

Glassmeyer vs. Penn. RR (N.J.) 167 Atl. 750;

Central of Georgia Ry. Co., vs. Holmes (Ga.) 34
S. E. 846.

These cases are also authority for the statement that whether a case should be submitted to the jury is one to be determined upon the facts of each case whether a res ipsa loquitur case or otherwise.

The mere fact that the doctrine of res ipsa loquitur applies doesn't compel judgment in favor of the plaintiff on the basis

of negligence, for the rule is merely invoked in law to reach a conclusion of negligence in the absence of evidence to the contrary by the defendant. If the defendant offers credible evidence to the contrary then the inference of negligence disappears and unless the plaintiff produces other evidence independent of the inference or presumption his case fails for want of proof. The burden always remains on him to establish negligence on the part of the defendant by preponderance of the evidence.

It is our opinion that if this case had been tried to a jury that the law as applied to the facts, would have compelled a directed verdict in appellant's favor. The *unexplained* fact of derailment no doubt would have made a jury issue, but where the cause of the derailment was fully explained and the cause shown to have been one that did not result from appellant's negligence, appellant was, as a matter of law entitled to judgment in its favor.

Gray vs. Baltimore & O. R. Co., *supra*;

Dierks Lumber & Coal Co., vs. Brown, *supra*;

Holland vs. Director General, *supra*;

Penna. R. Co., vs. Buckley (3rd Cir.) 210 Fed.
268;

Waller vs. Southern Pac. Co., (D. C. Cal.) 37 F.
Supp. 475;

St. L. & S. F. R. Co., vs. Gleaves, *supra*;

Woodward vs. C. M. St. P. R. Co., *supra*;

Glassmeyer vs. Penna. R. Co., *supra*;

Central of Georgia R. Co., vs. Robertson, (Ala.)
83 So. 102;

Virginia Electric Power Co., vs. Lowry (Va.) 184
S. E. 177;

Hines vs. Beard (Va.) 107 S. E. 717;

Chesapeake & O. Ry. Co., vs. Baker (Va.) 143
S E. 299;

Hudson vs. Fort Worth & D. C. Ry. Co., (Tex.)
139 S. W. 617;

Roanoke R. & E. Co., vs. Sterrett (Va.) 62 S. E.
385, 19 LRA (NS) 316;

Memphis Street Railway Co., vs. Stockton (Tenn.)
226 S. W. 187, 22 A. L. R. 1467.

In *Holland vs. Director General of Railroads*, *supra*, a passenger sued for injuries sustained in a derailment, relying on the rule of *res ipsa loquitur*. A verdict was directed for the defendant and affirmed on appeal. The cause of the derailment was a broken rail which contained an internal transverse fissure and which was concealed "and could not have been detected by the naked eye and that no other test than the actual breaking of the rail would have revealed this defect." On the evidence in the case the court said:

"It has been held by the Court of Errors and Appeals of New Jersey, and also by this court, that a defendant is not liable for injuries resulting from a latent defect of which it was ignorant and which could not be discovered by reasonable care and diligence."

The case of Central of Georgia R. Co., vs. Robertson, *supra*, is another case where the plaintiff was injured when a coach overturned due to a broken rail, the defect in the rail being a transverse fissure. This defect could not be discovered by any known test and the court reversed a judgment for the plaintiff stating that an affirmative charge in favor of the defendant should have been given by the court. In discussing the evidence the court said:

“In other words, did it show that the accident was an inevitable one or such that the highest degree of care and foresight could not have prevented or provided against? If so, it was not liable as a matter of law * * *. Here there is no conflict in the evidence; no evidence of a defect except a latent one, which all of the evidence shows could not be discovered by all known tests. * * *

“The evidence shows without conflict and to a reasonable certainty, that the wreck of the train which injured plaintiff was due to a latent defect known as ‘transverse fissure,’ and that science and art have discovered no means of detecting it.”

In Virginia Electric Power Co., vs. Lowry, *supra*, the derailment was caused by a fracture in the axle of the wheel just inside the hub, which could not have been detected without removing the wheel. The court stated that the rule of *res ipsa loquitur* does not have the effect of shifting the burden of proof and does not convert the railroad’s general issue into an affirmative defense but places the burden upon the plaintiff of establishing negligence. The defect referred to in the case could not have been discovered by any practical method of

inspection and in ordering judgment for the defendant the court said:

“In the case under consideration, the cause of the derailment was clearly established. It is a matter of common knowledge that occasionally there is a defect in metal or in machinery which causes it to break regardless of the care used to manufacture, select and maintain such machinery.”

In *Glassmeyer vs. Penna. R. Co.*, *supra*, the trial court directed a verdict for the defendant and the plaintiff appealed. The derailment which caused alleged injuries to the plaintiff resulted from a defect in a brake gear of a car, which defect could not have been found except by dismantling it in the shop. The court said:

“The carrier, therefore, demonstrated by uncontradicted proof that the injury occurred without negligence on its part. * * * a carrier is not liable for an injury due to a latent defect not discoverable by the exercise of reasonable care. * * * The defendant, by uncontradicted proofs, having rebutted the presumption of negligence, the direction of a verdict in its favor was proper.”

In *Chesapeake & O. Ry. Co., vs. Baker*, *supra*, the court held the Railroad Company was not liable for injuries to a plaintiff who was a passenger on one of defendant's trains when the train was derailed because a rail broke as the result of a transverse fissure. The court discussed the question of burden of proof and held that a mere equipoise would not entitle the plaintiff to a verdict. The court said:

“The only reasonable hypotheses to be gathered from evidence, as to the immediate cause of the accident, is that it arose from a defect in a rail not reasonably discoverable.”

In *Roanoke R. & E. Co., vs. Sterrett*, *supra*, the court held that the defendant was not negligent where a bridge fell because of a defect in a cord which had an imperfect weld and could not have been detected by the utmost scrutiny. The court said:

“Applying these well settled principles to the established facts in the case before us, the conclusion cannot be escaped that the accident under consideration was one of those inevitable and unavoidable casualties which human care and foresight could not have provided against.”

The case of *Memphis Street Railway Co., vs. Stockton*, *supra*, is also a case in point and in that case the court held that the Railroad Company was not responsible for the failure of an air brake to work where the defect therein was unknown.

In principle the case at bar cannot be distinguished from the decision of Judge St. Sure in *Waller vs. Southern Pacific Co.*, *supra*, which involved the derailment of a stream line train in Nevada on August 12, 1939, in which the court held that the plaintiffs were not entitled to judgment because they had not sustained the burden of proof.

There can be no difference in the principle to be applied in the case at bar than that which was applied in the foregoing cases. The transverse fissure which caused the rails to break in the cases cited constitutes a complete parallel to the facts in

the case at bar where the wheel broke from internal stress, which stress could not be found or discovered except by sawing or cutting the wheel as the witness Pflasterer did after the accident occurred.

The fact that the doctrine of *res ipsa loquitur* may be applicable does not change the rules laid down by the United States Supreme Court in *A. B. Small Co., vs. Lamborn*, 267 U. S. 245, where the court said:

“The rule for testing the direction of a verdict, as often has been held, is that where the evidence is undisputed, or of such conclusive character that if a verdict were returned for one party, whether plaintiff or defendant, it would have to be set aside in the exercise of a sound judicial discretion, a verdict may and should be directed for the other party.”

See also:

Gray vs. Baltimore & O. R. Co., *supra*.

“A mere scintilla of evidence is not enough to require the submission of an issue to the jury. The decisions establish a more reasonable rule, ‘that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.’

“Where the evidence upon any issue is all on one side or so overwhelmingly on one side as to leave no room to doubt what the fact is, the court should give a peremptory instruction to the jury.”

Gunning vs. Cooley, 281 U. S. 90, 94.

The effect of presumptions is well discussed and considered by this court in the case of *Ariasi vs. Orient Insurance Company*, (9 Cir.) 50 Fed. (2d) 548. The question in that case was whether or not the appellant's testimony rebutted the presumption that liquor was illegally possessed by the plaintiff arising solely from the revocation of a permit. The appellant testified that his winery was some two hundred feet away from the kitchen of his residence, where it was claimed that he had made an illegal sale of wine; that the wine had been kept in the house and had been kept separate from wine in the winery ever since the prohibition law went into effect; that it was kept in his house for his own personal use and was not wine that he had made himself but had bought it from other people before prohibition, together with some other testimony which was undisputed. The court reversed a judgment for the defendant and held that the court could not arbitrarily reject the testimony of a witness whose testimony appeared credible. The court further held that

“* * * in the absence of any evidence to the contrary the prima facie effect of the revocation is dissipated by positive evidence to the contrary. It does not constitute evidence to be placed in the scale, and weighed as against the positive evidence of the plaintiff to the effect that he did not intend to violate the law and had not done so.”

The court cites one United States Supreme Court case, to-wit: *Western & A. R. Company vs. Henderson*, 279 U. S. 639, 73 L. Ed. 884, which case we will refer to later, but in addition to that the court quotes from a great number of authorities to the

effect that a presumption disappears when the party against whom it operates produces contrary evidence. One of the authorities referred to states: "Presumptions are bats of the law, flitting in the twilight but disappearing in the sunlight of actual facts."

In *Western & A. R. Company vs. Henderson*, *supra*, the Supreme Court of the United States struck down a statute of the State of Georgia which raised a presumption against railroad companies and their employees in the operation of locomotives and trains of cars, and held that the presumption of negligence arose as to each of the particulars specified in the petition and the burden then shifted to the defendant company "to show that its employees exercised ordinary care and diligence in such particulars." The court stated that the effect of the statute was to raise a presumption that the defendant was negligent upon the mere fact of the collision. The appellee insisted that the presumption being established by statute had the effect of evidence and that it was for the jury to decide whether the company's evidence was sufficient to overcome the presumption and that it should not as a matter of law be dissipated when testimony is taken against it. The court said:

"Legislative fiat may not take the place of fact in the judicial determination of issues involving life, liberty or property."

Appellee in that case relied upon the case of *Mobile J. & K. C. R. Company vs. Turnipseed*, 219 U. S. 34, 55 L. Ed. 78 which the court stated was a different statute and which merely created *prima facie* evidence of want of reasonable

skill and care on the part of the railroad company and its servants. Quoting from the Turnipseed case the court said:

“The only legal effect of this inference is to cast upon the railroad company the duty of producing some evidence to the contrary.”

and stated that the statute in the Turnipseed case created merely a temporary inference of fact that vanished upon the introduction of opposing evidence, and for that reason the statute was sustained, but as to the Georgia Statute in the Henderson case, the court stated that it created “an inference that is given effect of evidence to be weighed against opposing testimony and is to prevail unless such testimony is found by the jury to preponderate,” and accordingly held that the statute violated that due process clause of the Fourteenth Amendment.

The doctrine of *res ipsa loquitur* applied to the case at bar creates only an inference of negligence which is rebuttable and results in a situation the same as the statute in the Turnipseed case, which the court held created merely an inference of fact that vanished on the introduction of opposing evidence.

See also: *Woodward vs. C. M. St. P. R. Co.*, (8 Cir.) 145 Fed. 577, where the court held in a railroad fire case that the statutory presumption of negligence was overcome as a matter of law by defendants evidence showing that the locomotive was operated with due care, and that reasonable care had been exercised to avoid defects in the locomotive.

In *Murray vs. Pawtuxet Valley St. Ry. Co.*, (R. I.) 55 Atl. 491, the court in affirming a judgment for the defendant

in a passenger case where the doctrine of *res ipsa loquitur* was applicable, said:

“It is the general rule that where unimpeached witnesses testify distinctly and positively to facts which are uncontradicted, their testimony suffices to overcome a mere presumption.”

We respectfully submit that there was no evidence of negligence established by the appellees. Any aid they had by reason of the inference arising from the derailment was completely overcome by appellant's proof. The equipment was thoroughly inspected after the accident and nothing was missing, except portions of the broken wheel on the rear right side of the fourth car behind the engine (R. 266-267); nothing was found on the roadbed either east or west of the point of derailment that had fallen from the train or that could have caused the derailment (R. 190). The cause of the derailment, therefore, is definitely placed on the broken wheel which broke from internal stress, which no human foresight could have guarded against, and which could only be found by sawing or cutting the wheel (R. 288). Appellees offered no evidence whatever of negligence. Their *prima facie* case being completely rebutted, or most certainly equally balanced, appellant was and is entitled to judgment in its favor as a matter of law, and the trial court accordingly erred.

II.

Mrs. Stanger was suffering from chronic cervicitis and a fibrous uterus, the result of previous childbirth infection, for the cure of which an operation was necessary and was performed, and the Railroad Company was not liable therefor, but was held in damages for all ills accruing to her since her last childbirth.

(Errors III to XI incl., pp. 8-12, 14-17 supra)

Since all of the errors embraced within the foregoing assignments are related, we shall discuss them together to avoid repetition of the record.

Albert G. Stanger and Phyllis Stanger, his wife, instituted two suits against the defendant to recover damages for allegedly negligently injuring them in a derailment that occurred about thirty miles north of Denver, Colorado, on January 14, 1940.

A brief reference to the husband's suit seems appropriate, because each complained of the same symptoms concerning nervous condition, and each undertook to corroborate the other on that point (R. 82-83, 143-144), and the judge, who tried the case without a jury, completely rejected Stanger's testimony and denied him a recovery, and by the same token he must have disbelieved Mrs. Stanger insofar as she testified with respect to her husband's alleged physical and nervous injuries (R. 82-83, 14, 22).

The right to damages for personal injuries sustained by a married woman is community property.

Labonte vs. Davidson, 31 Ida. 644, 175 Pac. 588.

Mr. Stanger's testimony concerning injury to and pain in his back and the prolonged treatments that he received appear at pp. 82-86 of the record. Mrs. Stanger's corroboration appears at pp. 143-144. He testified that he had treatment in Texas, employed four doctors in Idaho and had spent from five to seven days at Mayo Brothers Hospital (R. 84, 127). He did not call any doctor of any sort and left the implication that he had been at Mayo Brothers for personal treatment, but on cross-examination it developed that the only reason he was there was to accompany his father (R. 127). The following summer he won the golf championship at Sun Valley (R. 124) notwithstanding the fact that in playing golf he had to take milk along to stimulate and sustain him (R. 128) and lie down occasionally on the course (R. 128). On January 2, 1941 he wrote a letter to Mr. Jeffers, President of the Union Pacific Railroad Company, calling attention to the fact that he was a big shipper and threatening business reprisals unless Mr. Jeffers should yield to his demands regardless of the merits (R. 132-135). The Judge denied Stanger recovery on the ground that "the evidence disclosed that he did not receive any injury" (R. 14). He did not appeal.

Mrs. Stanger testified on direct examination that her physical condition for three months previous to the accident, in January 1940, "had been perfect. I was in better condition than I had been for a long time" (R. 143). But she had gone to Dr. Wooley on November 10, 1939 (R. 216) two months previous to the accident, to treat her for abnormal flowing

from which she had suffered since the birth of her last child in February (R. 102, 103) and was last there December 14, 1939 (R. 220) and it was then agreed that she should return to him for further treatment when she should get back from her trip, but she never did (R. 220). She said Dr. Wooley had never made a physical examination of her because of her flowing (R. 149). From her direct testimony the inference would be that she merely "rested for a while at Denver and they took us to the train to go to Houston" (R. 139).

Upon arrival at Denver Mrs. Stanger went first to the home of some friends, where she had dinner, then to the Horse Show that afternoon, and to dinner again at the Denver Athletic Club after the Horse Show (R. 146), and then to the train and on her way to Houston, Texas, arriving Tuesday morning and leaving Friday, and thence to Mexico City, where she and her husband spent from Sunday to Wednesday sight-seeing (R. 146); thence home by way of Los Angeles. Following her arrival at Idaho Falls January 29th or 30th she says she went to bed but did not call any physician until on February 12th she went to Dr. Hatch (R. 141), who operated on her July 9, 1940, completely curing the condition of excessive bleeding of the uterus (R. 142-143) from which she had suffered ever since the birth of her last child, which she testified was two years old at the time of the trial on October 20, 1941 (R. 148) but which, according to the hospital record, Exhibit 1, was born in March 1939.

Two men by the names of Bush and Hurst were riding with the Stangers at the time of the derailment (R. 145) but neither of them were called by the plaintiffs as witnesses.

No friend nor acquaintance nor relative from Idaho Falls was called to corroborate Mrs. Stanger concerning her condition from January 29th or 30th until February 12th, or thereafter. She did not call as witnesses either Dr. Miller, her family physician, who attended the birth of her last child (R. 147), nor Dr. Woolley who had been treating her and whose service she had arranged to further employ (R. 220). Her testimony given in rebuttal to Dr. Woolley and Dr. Brothers left numerous damaging points undisputed, and insofar as she did dispute them, the hospital record made by or at the direction of her own physicians (R. 108-110), definitely resolved the issues in support of the doctors, Exhibit 1, which is as follows:

“Case History 7/8/40. Provisional Diagnosis — Fibrosis uteri. * * * Menstruation started with 14, regular till delivery March 1939, finished menstruating last week. Since this time she has been flowing instead of 4 days *always 3 weeks, quite heavy flow.*”

It is noteworthy that this case history contains no reference to any mishap while traveling on the railroad.

As it seems quite obvious that the lower court misconceived the law of the case we present that at this point before further discussion of the history of the case and medical testimony.

In *Union Oil Company of California vs. Hunt*, 111 Fed. (2d) 269, the 9th Circuit Court of Appeals on April 24, 1940, established the law for this circuit in a decision which, after a review of the authorities and decisions at large, includ-

ing a review of the law as announced by the Idaho Supreme Court, said at p. 277:

“If the facts of aggravation of injury are proved, ‘The wrong-doer must answer for any aggravation of the plaintiff’s condition for which he is responsible, and that is the limit of his liability.’ Sutherland on Damages, vol. 4, Sec. 1244, p. 4676. The recovery, however, must not include damages for injuries which result from the original injury, but must be confined to damages for aggravation of that condition or injury. *Jones vs. Caldwell*, 20 Idaho 5, 116 P. 110, 48 L. R. A., N. S. 119, 121. It follows, then, that the plaintiff cannot recover in this action for any injuries received prior to November 5, 1934. *Maynard vs. Oregon Railroad Co.*, 46 Or. 15, 22, 78 P. 983, 68 L. R. A. 477. The difficulty with the situation presented here lies in the fact that much of the evidence of pain and suffering and other damages applied only to the first injury, for which any right to recover was altogether abandoned during the trial—at just what stage of the proceeding is not apparent. So we have the anomaly of an award of damages for a second injury based upon improperly admitted evidence concerning a prior injury. Evidence of the first injury and damage thereunder is irrelevant for any purpose, other than to show aggravation. * * * This does not preclude, however, the reception in evidence of testimony of the plaintiff’s condition immediately preceding the second injury, which would be admissible for the purpose of showing a base or standard for measuring the damages suffered by the plaintiff in the said second injury.

“It is said in the article on ‘Damages,’ in American Jurisprudence:

“‘The damages recoverable in any case must be susceptible of ascertainment with a reasonable degree

of certainty, or, as the rule is sometimes stated, must be certain both in their nature and in respect of the cause from which they proceed.' 15 Am. Jur. Sec. 20, p. 410.

“ ‘The damages recovered in any case must be shown with reasonable certainty both as to their nature and in respect of the cause from which they proceed. No recovery can be had where it is uncertain whether the plaintiff suffered any damages unless it is established with reasonable certainty that the damages sought resulted from the act complained of. Hence, no recovery can be had where resort must be had to speculation on conjecture for the purpose of determining whether the damages resulted from the act of which complaint is made or from some other cause. * * *’. 15 Am. Jur. Sec. 22, p. 413.”

In the light of the foregoing decision, which is the considered opinion of this Court, it would seem to be a needless task to attempt to demonstrate the correctness of such decision. However the rule as above announced is in harmony with the general statement of the law by Sutherland on Damages, quoted in the opinion, and text writers generally. Further text and authorities in point are as follows:

15 Am. Jur. 488, Sec. 80, Title “Damages”;

17 Cor. Juris 740, Damages, Subtitle “Disease”;
25 C. J. S. 480, Note 18;

Baldwin vs. Peoples Railway (Del.) 76 Atl. 1088;

Braunstein vs. Peoples Railway (Del.) 78 Atl. 609;

St. L. S. W. Ry Co., vs. Johnson (Tex. Sup. Ct.)
97 S. W. 1039, 1042;

Whitcomb vs. N. W. N. H. & H. R. Co., (Mass.)
102 N. E. 663.

In Pomeroy vs. B. & A. R. Co., (Me.) 67 Atl. 561, the court held:

“Damages reduced by the court upon the ground that the jury failed to take into consideration the fact that before the accident the plaintiff had been suffering from a complication of physical troubles which account partially, at least, for her present condition.”

In Guldner vs. Cramm, 112 Pac. 623, the syllabus by the Kansas Supreme Court is as follows:

“A man and his wife were traveling upon the public highway in a top buggy, and were negligently struck by a passing automobile. The wife was injured. She at the time was and had been suffering with abdominal fibroid tumors. She was, in about 10 days after the collision with the automobile, operated upon for the removal of said tumors, and died from the effect of the shock produced by such operation. The husband commenced this action to recover damages from the owner of the automobile for the loss of the services of his wife and expenses incurred on account of the injuries received by her from the automobile. Held, that no damages could be recovered in such action on account of the operation.” (The recovery was \$225).

In Frick, et al., vs. Washington Water Power Company, 130 Pac. 98, it was held by the Washington Supreme Court:

“Where, in an action against a carrier for injuries to a passenger, she alleged that prior to the injury she

was an able-bodied woman in good health, but that, by reason of the injury sustained, she acquired appendicitis, retroversion of the womb, and certain other injuries requiring a surgical operation, from which she never fully recovered, but there was evidence that she suffered from a diseased appendix and had retroversion prior to the injury, she was not entitled to recover damages under her complaint for an aggravation or an acceleration of a diseased condition previously existing, unless it appeared that she had no knowledge thereof prior to the accident."

at page 100 the court said concerning the plaintiff:

"She was, no doubt, entitled to recover all the damages which she suffered; but damages accomplishing the same result to a person in perfect health would certainly be greater than to a diseased person. In this case, the plaintiffs were standing upon the allegation of perfect health and in all fairness should abide the result upon the issue as made by them."

In March 1939 Mrs. Stanger gave birth to her third child and was attended by Dr. Miller, her family physician (R. 147). On November 10, 1939, Mrs. Stanger consulted Dr. Hoyt B. Woolley for excessive flowing (R. 219). Dr. Woolley testified from his record made by him at the time that when Mrs. Stanger consulted him she told him that for the past four years she had been flowing eight to ten days twice a month, and had three children ~~R.~~ aged 9, 6 and 2 (R. 148), further reading from his notes made at the time of Mrs. Stanger's visits to his office, he testified that she said that this was accompanied by large clots, backache, cramps in the groin before menses and during menses, fatigues easily, run down most of the time and had been taking iron preparation, that

the last menstrual period was October 28th to November 9th and that the last five days was much darker than usual (R. 219). The blood count at that time showed 42% hemoglobin. The pathological report fits in with the history that Mrs. Stanger gave to Dr. Woolley (R. 224). He gave her a prescription for an elixir to be taken three times a day and also gave her shots or hypodermic injections of astrone and the last time he saw her was December 14, 1939 (R. 220). He did not give her a physical examination because she was planning to go on a trip but had an understanding with her that she was to return to him after she had made the trip (R. 220). She never returned to him, and Dr. Woolley states that she was not cured and nobody disputes him. Upon cross-examination he admitted that of course she would not menstruate while pregnant. Mrs. Stanger's counsel could of course have inspected Dr. Woolley's record, which he stated he had in court, if they had so desired.

Mrs. Stanger took the witness stand in rebuttal to Dr. Woolley and testified that she did not tell him that she had menstrual periods of the duration which he had testified but asserted she told him that instead of occupying four days they were prolonged to seven days (R. 300). She did not dispute Dr. Woolley's statement that she was to return for future treatment, nor did she deny that she had told him that her periods of flowing had been attended by large clots, backache, cramps in the groin before menses and during menses, run down, easily fatigued, and that the last five days of discharge of her last menstrual period was much darker than usual (R. 219). We must assume under the circumstances that Dr.

Woolley's testimony in these particulars was correct. Considering that it coincides with her hospital record, it is conclusive.

Dr. Woolley further testified that he had built up her hemoglobin count to 62 before she left on her trip but that the treatment that he was giving her would not effect a permanent cure and that the effects of it would wear off in time, that an operation would be necessary to cure a condition of fibrosis uteri with diffuse endometrial hyperplasia (R. 224) (Muscular or abnormal increase of the lining of the uterus (R.99,226) , and that to ultimately effect a stopping of the excessive flowing it would be necessary to remove the uterus (R. 238, 244) . This part of Dr. Woolley's testimony was not disputed, but was either circumstantially or expressly corroborated by her own physician and witness, Dr. Hatch (R. 96, 99, 100) and concurred in by Dr. Brothers (R. 251) .

Dr. Brothers testified for the defendant that he had examined Mrs. Stanger at Idaho Falls on October 9, 1941, and that she had told him that she had experienced excessive menstruation following the birth of her last baby and never was free from some bloody discharge except four or five days at a time (R. 248) ; had been given hypodermic injections with some improvement and was feeling some better when she went on the trip. Mrs. Stanger, when called in rebuttal, merely asserted that she did not state to Dr. Brothers at the time he examined her at the hospital on October 9th, 1941, that she had been flowing excessively since the birth of her last child or at any other time. Since that was the subject matter of her suit, and the occasion for his examining her what could be

more natural than that they should have mentioned the matter? Again what Dr. Brothers testified Mrs. Stanger told him is in its most important particulars corroborated by her hospital record. She does not deny the substance or form of their conversation, but denies that the thing relative to which he was examining her was mentioned at all (R. 300). Dr. Brothers further testified that he had read the pathological report and from that and his examination he was of the opinion that she had been suffering from fibrosis of the uterus, chronic cervicitis, inflammation of the cervix and hyperplasia of the endometrium. The symptoms of fibrosis uterus recorded in the pathological report (R. 249) are excessive menstruation, followed by anemia (low blood count), all the symptoms of anemia, such as nervousness and weakness (R. 249) He further testified that while she might have been given x-ray or radium treatment that the character of treatment that Dr. Hatch performed, an operation, would ultimately be necessary (R. 251). Dr. Brothers was asked, "assuming the history that Mrs. Stanger gave you about excessive menstruation following the birth of her last baby, approximately two years ago, what is your opinion as to what that condition was, or what it was leading up to. Did that have any connection with the fibrosis uteri?" His answer was "Yes, I think it did" (R. 251), and in this even her own physician did not dispute him. He further stated that excessive flowing is not caused by physical violence or injury unless there is a direct injury to the organ, even in a uterus not normal (R. 257), and in that he was not disputed either by Dr. Hatch or anyone else; that all of the symptoms which Mrs. Stanger displayed following

the derailment, consisting of a nervous condition and excessive flowing, would be only temporary and should clear up with a few day's rest (R. 258). Neither Dr. Hatch nor anyone else disputed this opinion of Dr. Brothers. What she actually did is established by her own testimony hereinbefore recited, to the effect that on the day of the derailment she enjoyed two dinners, with the horse show sandwiched between the noon meal and the evening meal at the Denver Athletic Club, and thereafter boarded the train for Houston, Texas, from whence she went to Mexico City, where she viewed the sights for three or four days, and then returned home by way of Los Angeles (R. 146). Can anyone be so credulous as to believe that with this performance she was either suffering serious nervous shock or serious physical handicap or disorder?

The testimony showed that the table against which Mrs. Stanger asserts she was thrown was $10\frac{1}{4}$ inches above the cushion upon which she was sitting and that the cushion had some give in it (R. 268). The court signed findings prepared by plaintiffs' counsel to the effect that Mrs. Stanger had been thrown violently against the table, striking the lower portion of her abdomen, but the words "lower portion of" were stricken, upon appellant's objection (R. 43). Dr. Hatch, testifying for the plaintiff, stated that the uterus, the ovaries and the cervix are situated in the lower part of the body behind the pelvic and pubic bones (R.101), which corroborates Dr. Brothers' testimony to the effect that excessive flowing is not caused by violence unless there is a direct injury to the organ (the uterus) and that could not happen under the facts of the case, with the organs in question thus situated and protected

and the table so far above them. The record absolutely will not support such a finding. One can readily conclusively demonstrate with a ruler that a point $10\frac{1}{4}$ inches above the seat or cushion is considerably above the navel and very near to the solar plexus of a man and probably would reach the solar plexus and ribs of a small person such as this woman, especially if the person was in a forward position, such as would be the case if the vehicle were suddenly stopped.

Under these circumstances the hospital record which was introduced in evidence becomes important, for that bears an entry to the effect that since the birth of her last child she had been flowing instead of four days always three weeks, quite heavy flow last two months, weakness but up and around, very nervous, takes liver shots since September 1939. This record was not made or influenced by any adverse person, and must be the resolving factor of the conflict between the testimony of Dr. Woolley and Dr. Brothers on the one hand and of Mrs. Stanger on the other hand. This much of her hospital record is definitely certain, and so far as history is concerned, must rest upon her own indisputable statements and the simultaneous entries made either by or at the direction of her own physicians.

Dr. Hatch spoke of this fibrosis uterus as a bleeding uterus and stated that he performed the operation to stop the bleeding and accomplished his purpose (R. 96, 99, 100, 103). He had testified that the physical findings before the operation did not disclose enough definite abnormality to justify the operation if it had not been for the otherwise incorrectible bleeding''

(R. 116), but obviously he must have so concluded or he would not have performed the operation which he did with the purpose in mind which he had and which diagnosis was subsequently fully confirmed by the pathological report. But regardless of what his motive may have been the removal of the fibrosis uterus did stop the flowing and the pathological report of Dr. Daines of Salt Lake City corresponded with Dr. Hatch's pre-diagnosis by reporting "fibrosis uteri with diffuse endometrical hyperplasia and chronic cervicitis follicular cyst of ovary with corpus hemorrhagicum" (R. 109-111). There is no room for any other conclusion under the evidence than that this condition was one which resulted from child birth and was well established before Mrs. Stanger took the trip and that this preestablished condition for which she had been seeking relief was the *cause* of the operation being performed.

These undisputed facts were utterly ignored by the Court in the making of his finding (R. 22) and rendering judgment (R. 28), by which process the court jumped the gap, and without proof to support him, charged the defendant, not with temporary nervousness and inconvenience, which is all the record will support, but with the consequences of a condition which the physicians unanimously agreed existed before the derailment and required the operation to correct.

At no time did Dr. Hatch or anyone else testify that either the physical or nervous shock, or both, or any injury sustained by Mrs. Stanger in the derailment *caused* the fibrosis uterus or was the *cause of the operation*, or that there would not have been need for an operation if she had not been in the derailment.

If we lay aside all evidence except the undisputed medical testimony of what was found and what was done to correct it the chain of cause and effect which the record compels is this: the uterus is situated within the pelvic and pubic cavity (Hatch R. 101),

“The pelvis is the baselike cavity of the lower portion of the trunk containing the urinary and genetal organs—the genetal organs embrace the uterus and ovaries. The pubic bones are at the lower part of the pelvic cavity.” (any modern dictionary) ;

Dr. Hatch operated on her for excessive flowing and continued flowing which was the *cause* of her condition (R. 103, 95) and which operation cured it (R. 97) ; Dr. Woolley treated her for the same thing subsequent to the birth of her child and *before* her trip; chronic fibrous cervicitis “is scarred tissue formation in the neck of the womb that is very frequently due to chronic infection following childbirth and so forth” (Hatch, R. 101) and infection and scar tissue following childbirth could cause fibrosis uterus if there is severe infection (R. 101-102), and Dr. Hatch had a history of her “having this bleeding” “following the birth of the child” (R. 104) ; that he operated to stop the bleeding and that it was necessary to do that (R. 96) ; that she told him she had been to other doctors for treatment for this same condition, “that is for bleeding that was prolonged after childbirth” (R. 105) ; she had “bleeding uterus, nervous, emotionally upset. *The thing that concerned me was the bleeding uterus*” (R. 104). When he operated the excessive flowing ceased, hence the sequence of cause and effect is (1) childbirth infection, (2) fibrosis

uterus and chronic cervicitis, (3) bleeding, (4) thinning of the blood, (5) nervousness; remedy (a) remove the fibrous uterus (b) caused by childbirth infection (c) the bleeding stops (d) the blood count builds up (e) the nervousness ceases (R. 249-250). Conclusion: Mrs. Stanger, regardless of what her testimony may have been, contracted an infection and scarring of the uterus following childbirth, creating a condition of fibrosis uterus, as a result of which the uterus did not contract and shut off the flow (Hatch 99, Woolley 226) for the ultimate and permanent cure of which an operation was necessary (R. 224, 96-99-100, 251).

1. She was not struck in lower abdomen, there being no evidence to suport such a finding (R. 19, 29, 43).

2. The operation was not caused by the derailment, and the record does not support such a finding;

3. The derailment was not the cause of the nervousness but the nervousness was a result well recognized by the medical profession of fibrosis uterus and chronic cervicitis, resulting in bleeding and consequent nervousness, the well developed symptoms of which she had displayed at least since March, 1939;

4. The sterility of Mrs. Stanger was not the result of the derailment (R. 22) and was not caused thereby, and the record does not support such a finding;

5. The most serious consequences to Mrs. Stanger of the

derailment, if she had used ordinary prudence, would have been but of a few days duration; but with or without ordinary prudence the operation was caused by a chronic bleeding uterus, and not the derailment;

6. That the mishap probably was not of serious, if any consequence, to Mrs. Stanger, for such a conclusion is not reconcilable with what she did immediately thereafter and during the two weeks immediately following, nor the undisputed medical testimony;

7. That upon the face of the record the court in making his award has made no segregation between the condition of the plaintiff existing before the derailment, for the correction of which the operation was performed, and the limited consequences lawfully assignable to the derailment, but that the major portion of the award is in compensation for a chronic condition, and the cure thereof, with which the defendant is not chargeable or liable in law.

We submit, first, that it stands undisputed upon the record that the derailment was caused by a fresh break of a wheel, from internal stress, which could not be discovered except by sawing or cutting the wheel, and the appellant was entitled to judgment as a matter of law, and, secondly, it is established beyond dispute that Mrs. Stanger was suffering from a well developed physical disorder, which was the

occasion and cause of the operation performed upon her, and the lower court erred in charging the defendant therewith.

Respectfully submitted,

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IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

UNION PACIFIC RAILROAD COMPANY,
a corporation,

Appellant,

vs.

ALBERT G. STANGER AND PHYLLIS STANGER,
Appellees.

BRIEF OF APPELLEES

Appeal from the District Court of the United States for the
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IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

UNION PACIFIC RAILROAD COMPANY,
a corporation,

Appellant,

vs.

ALBERT G. STANGER AND PHYLLIS STANGER,
Appellees.

BRIEF OF APPELLEES

STATEMENT OF FACTS

That on January 13, 1940, the plaintiffs purchased of and from the defendant as such common carrier two passenger tickets paying the full price therefor entitling them to ride on defendant's passenger trains from Idaho Falls, Idaho, through the State of Idaho, through the State of Wyoming and to Denver in the State of Colorado and on to Houston in the State of Texas. That on January 13, 1940, as aforesaid, the plaintiffs boarded one of defendant's passenger trains at Idaho Falls, Idaho, and rode in a standard pullman car, which car constituted a part of one of defendant's passenger trains, from the City of Idaho Falls, Idaho, to a point approximately 37 miles from the City of Denver in the State of Colorado, at which point on January 14, 1940, a number of

cars of defendant's said passenger train, including the standard pullman car in which the plaintiffs were riding, derailed or wrecked (R. 14).

That at the time of the derailment or wreck the passenger train of the defendant consisted of a number of passenger cars, there being 7 or 8 passenger cars in said train, to which an engine was attached, and that at the time of the said wreck or derailment or immediately before, the said passenger train was traveling at a speed of between 60 and 65 miles per hour. The weather at the time of the derailment or wreck was cold and there was snow on the ground. At the time of the said wreck or derailment the said engine and cars were traveling upon the defendant's line of railroad and was under the care, management and control of the defendant company, its agents, servants and employees, who were then and there acting within the line, scope and course of their employment (R. 14).

That at the time of the accident or derailment or wreck the plaintiffs were seated in the seats of the standard pullman car. The plaintiff Phyllis Stanger was facing the direction in which the train was moving and her husband was seated directly across the table from her and both were seated next to the windows of said standard pullman car. Plaintiffs with two other persons who were riding upon said train were seated at a card table that had been furnished by the defendant company and were engaged, at the time of the wreck, in a game of cards. At the time the wreck or derailment occurred the plaintiff Phyllis Stanger was thrown suddenly and violently and without warning forward striking her in her abdomen across and against the edge of the said card table and was

thrown with great force and violence against other parts of said car severely and permanently injuring her internally and bruising and inflicting upon her injuries about the back, legs and hand. The card table that had been furnished by the defendant as aforesaid and that was being used at said time and place by the plaintiffs was firmly attached to the side wall of the pullman car in at least two places by iron braces or attachments. The top of said table was approximately 27 inches above the floor of the standard pullman car and was approximately $2\frac{1}{2}$ feet wide and approximately 3 feet long, the edge of the said table being approximately $\frac{1}{2}$ inch in depth or thickness (R. 15).

That at the time of the derailment or wreck the pullman car in which the plaintiffs were riding was derailed or left or was thrown from the rails upon which it had been traveling and the end of the standard pullman car in which the plaintiffs were seated and riding left the rails of the railroad track and went down into the barrow pit and struck against a bank of solid or frozen earth that was approximately 4 feet high causing the said car to come to a sudden violent stop. The rails upon which said car had been traveling before being derailed were torn loose from the ties to which they had been attached and were twisted and bent. When the standard pullman car came to rest after the derailment it was in a tilted position and standing at an angle from the tracks (R. 16).

That at the time of the accident the plaintiff Phyllis Stanger was thrown forward violently against the edge of the card table that had been furnished for her use by the defendant company and struck her on and across her abdomen on

and against the said card table with such force and violence that she very shortly thereafter, and before leaving the scene of the wreck, began to flow excessively. Which excessive flowing continued from the time immediately after the accident and until after her return home at Idaho Falls, Idaho, and until she underwent a surgical operation by one Dr. Hatch at Idaho Falls, Idaho, in July of 1940. That at the time the surgical operation was performed upon her by the said Dr. Hatch in July of 1940 her uterus was removed because of the said injuries received at the time of the accident, and the resultant excessive flowing, and the removal of her uterus thereby making her sterile, which condition is permanent and deprives her of a natural gift. That the removal of her uterus was necessary in order to stop or correct her excessive flowing of blood. That the nervous stress and nervous shock received at the time of the accident and derailment caused and greatly contributed to her excessive flowing. That at the time of the said accident and derailment the said Phyllis Stanger received great nervous shock and injury and experienced at said time and place severe nervous stress in addition to the actual physical injuries. And because of the excessive flowing and the length of time the same continued the said plaintiff Phyllis Stanger became physically weak and in a general run-down physical condition. That prior to the accident the plaintiff was a young woman approximately 28 years of age, the mother of three children and enjoying reasonably good health and was able to and did perform the greater portion of the ordinary duties of a housekeeper, wife and mother (R. 17).

That after the accident and until a few weeks before the trial of the cause she was unable to perform her household

duties because of her physical weakness and her nervous condition brought about by said excessive flowing and as a result of the injuries received in said accident, and the plaintiffs were compelled to and did employ a maid to perform the work about the house and home that the said Phyllis Stanger had theretofore performed prior to the accident (R. 18).

That the excessive flowing that commenced immediately after said accident and all of the personal injuries received by the plaintiff Phyllis Stanger in said accident were proximately caused by and due to the negligence and carelessness of the defendant, its agents, servants, and employees acting within the line, course and scope of their employment. That the excessive flowing and the removal of the uterus of the said Phyllis Stanger thereby making the said plaintiff Phyllis Stanger sterile and the nervous shock and all of the personal injuries suffered and received by the said plaintiff Phyllis Stanger in said accident were due to and proximately caused by the negligence and carelessness of the defendant, its servants, agents and employees acting within the line, course and scope of their employment in failing in their duty of inspection of the passenger cars and equipment prior to the time the said accident occurred (R. 18).

That in an effort to effect a cure for the injuries of the plaintiff Phyllis Stanger a surgical operation was performed upon her and the plaintiffs incurred large expenditures of money for physicians and surgeons, hospital bills and nurse's hire and medicines (R. 19).

That the defendant, its agents, servants and employees, at the time and place of the derailment mentioned herein and

the accident that occurred and prior thereto owed to the plaintiffs who were riding as paid passengers on a regular passenger train in charge of, controlled and under the management of the defendant, its agents, servants, and employees, a high degree of care for their safety, and the duty of inspection, control, maintenance and management of the passenger cars and the trucks underneath the same and all other equipment connected therewith, and that if the defendant, its agents, servants and employees then and there acting within the line, course and scope of their employment had exercised and discharged to the plaintiffs that degree of duty and degree of care of inspection and maintaining and management and controlling of its passenger equipment and cars and trucks and other equipment connected therewith, prior to the time the accident occurred, that is required by the law of common carriers by rail engaged in the transportation of paid passengers on passenger trains for hire as under the facts and circumstances disclosed by the evidence herein, the derailment and the resulting injuries of the plaintiff Phyllis Stanger in Case No. 1149 would not have occurred (R. 19).

The facts and circumstances of this case bring the plaintiffs within that class of cases that where the circumstances of the occurrence that has caused injuries are of a character to give ground for reasonable inference that if due care had been employed by the defendant, charged with care, the occurrence that happened would not have happened, and gives ground for the reasonable inference in this case that if due care had been employed by the defendant, its agents, servants and employees, who were then and there charged with care in the

inspection, maintenance, management and control of its passenger cars and for the equipment connected therewith that the occurrence that happened would not have occurred. This presumption must be rebutted by the defendant. The defendant by its evidence in the case of Albert G. Stanger and Phyllis Stanger having failed to rebut the inference of negligence drawn from the facts and circumstances of this accident that if due care, inspection and management and control had been employed by the defendant, its agents, servants and employees, the derailment and consequent injuries would not have occurred. That it appears clearly from a fair analysis of defendant's evidence that the defendant, its agents, servants and employees acting within the line, course and scope of their employment, did not, prior to the accident, exercise or use or discharge that degree of care of inspecting, maintaining, managing and operation of its passenger equipment that the law requires of it as under the facts and circumstances in these cases required. That all of the injuries and loss received by the plaintiff Phyllis Stanger aforesaid were proximately caused by and due to the negligence of the defendant, its agents, servants and employees while acting within the line, course and scope of their employment (R. 19-20).

That the plaintiff Phyllis Stanger suffered and sustained as a result of the derailment proximately caused by and due to the negligence and carelessness of the defendant, its agents, servants and employees, severe and permanent injuries that have caused, since the time of the accident and will continue to cause her nervousness and physical suffering and discomfort so long as she may live. She has suffered and sustained the per-

manent loss of a natural gift by the removal of her uterus by reason of the injuries she received at the time the accident occurred, thereby making her sterile (R. 20-21).

APPELLEES' TESTIMONY

Albert G. Stanger and Phyllis Stanger are husband and wife and reside at Idaho Falls, Idaho (R. 125-126). On January 13, 1940, they purchased of and from the appellant herein tickets entitling them to ride upon one of appellant's passenger trains from Idaho Falls, Idaho, to Houston, Texas, paying the full price for said tickets (R. 60-61). At a point approximately 30 miles before arriving at Denver, Colorado, and about 9:30 A. M. of January 14, 1940, the passenger train on which the appellees were riding was derailed or wrecked (R. 63-64).

At the time the wreck occurred appellees were seated at a card table engaged in a game of cards. They were using a table that had been furnished by the defendant company. Which table was securely anchored into the wall of the pullman car (R. 63-64). The train suddenly and without warning and while moving at a speed of approximately 65 miles per hour left the rails or was wrecked going into the barrow pit (R. 65-66). The derailment occurred all of a sudden; appellees were knocked from side to side with the jolting of the car; screws were on the floor; seats thrown out of place; and splinters were lying around, and the glass in the window by which appellees had been sitting was broken (R. 66-67).

After the wreck the car in which appellees had been riding rested at an angle in the barrow pit (R. 68). The weather

at the time was cold and snow was on the ground (R. 67-68).

Phyllis Stanger commenced flowing at the wrecked car (R. 69-70). After the wreck an automobile was hailed and appellees were taken to Denver where the Railroad doctor was called and administered some aid to Mrs. Stanger (R. 70-71). Phyllis Stanger complained of pain, immediately following the wreck, in the abdominal region and continued to flow from the time of the wreck (R. 72).

Phyllis Stanger prior to the injuries received in the train wreck did her housework, but from the time of the wreck up until the time of trial had been unable to perform her duties about the house (R. 81). The reason she did not perform her work about the house since the time of the wreck was because of ill health (R.81-82). Help was not employed to assist Mrs. Stanger in her household work before the accident. A doctor bill was paid for Mrs. Stanger's injuries in the sum of \$300.00, and a hospital bill in the sum of \$200.00, besides the special nurses, the blood transfusions, etc. (R.82-83). Appellees, husband and wife, at the time of the trial had been married ten years and were the parents of three children (R.125-126).

At the time of the derailment Phyllis Stanger was facing the direction in which the train was moving (R. 126). The first Phyllis Stanger knew there was a wreck was when there was a violent rocking back and forth of the train and she was thrown against the card table and then towards the side of the car (R.127). The table against which she was thrown was securely fastened to the wall. The table struck her in the abdomen and pushed her against the side of the car and threw her against the car, her right side against the car. In addition

to striking the abdomen she received a cut on her leg. There was dirt, bolts and broken parts of the car on the floor, and the sides where the seats were the seats were jammed together by the wreck. It was an awful mess (R. 127).

After the car stopped Mrs. Stanger laid there for a while until she was assisted up, and she was assisted out of the car with the assistance of the other men. She had a terrific pain in the abdomen at that time. She was assisted out of the car to the door of the car and then assisted out of the door of the car to the outside. She immediately started flowing and had just finished her monthly period two or three days before starting on this trip (R. 127-128).

At the time of the wreck it was cold and there was snow on the ground. After the wreck Mr. Stanger hired a car and took his wife to the station at Denver (R.129). From Denver Mrs. Stanger rode in a pullman car to Houston. She was very nervous and not able to sleep at all the first night. Mrs. Stanger stayed at the hotel. She did not attend any meetings and stayed at the hotel most of the time. She had the sensation that they were having a wreck all of the time (R. 129). She arrived back home January 29 or 30th. She stayed in bed most of the time to see if she couldn't check the flowing, and finally went to the doctor about two weeks after returning home.

From the time of the wreck she continued this flowing, and it became worse and worse, and as time went on the nervous condition got worse. The doctor tried to take care of her at that time, and instead of the condition improving it still got worse. She became more nervous and excited and couldn't sleep at night. The doctor who attended her was Dr. Ray

Hatch (R. 130-131). She lost fifteen pounds in weight (R. 132).

Prior to the time of the wreck Mrs. Stanger looked after her housework and did her housework without hired help. After returning from this trip and after this train wreck occurred she was unable to do her housework and had to have help. She had to have help up to within three days before the trial of this cause (R. 131).

Dr. Hatch performed an operation on Phyllis Stanger in July, 1940, which operation stopped the hemorrhaging (R. 132). As a result of the hemorrhaging Phyllis Stanger lost fifteen pounds weight (R. 132).

Previous to the trip in January the physical condition of Phyllis Stanger and three months previous had been perfect. She was in a better condition than she had been for a long time. That three months before she had been to a doctor because her period which was normally four days had gone to about a seven-day period. The doctor checked her up and she had been in perfectly normal health up to the time of the wreck (R. 132-133).

At the time of the wreck Mrs. Stanger was seated next to the window. After arriving at Denver and during the afternoon she went to a horse show at Denver, and had dinner again afterwards at the Athletic Club after the horse show (R. 133) (R. 135-136). At the time of the wreck the weather was freezing with snow on the ground (R. 137). Prior to the time of the wreck Phyllis Stanger had been to but one doctor for treatment (R. 137). Dr. Miller took care of her at the time of the birth of her last child (R. 137-138).

Prior to going to Dr. Woolley Mrs. Stanger had not been troubled with excessive flowing, but her period of flowing was approximately three days longer than her normal period, which was four days. She did not go to Dr. Miller to have this condition corrected. She had never planned the kind of operation performed upon her by Dr. Hatch (R. 139). Dr. Woolley never made an examination of Phyllis Stanger. He merely gave her liver shots, which treatment did stop the flow of blood (R. 139).

Before going on this trip Mrs. Stanger was not nervous nor easily fatigued. The reason for her going to the doctor is because she felt that she was not picking up as fast as she should after the birth of her last child. At the time Mrs. Stanger called on Dr. Woolley, and before the wreck occurred, she was not nervous at all, compared to what she had been since the wreck occurred (R.140-141). In October, 1940, Mrs. Stanger called on Dr. Woolley for a check-up, and he informed Mrs. Stanger that it was all cleared up, and from the personal knowledge of Mrs. Stanger it was cleared up (R.141-142).

Mrs. Stanger denied telling Dr. Brothers, who examined her in the L. D. S. hospital, October, 1941, that she had been flowing excessively since the birth of her last child. She did not say anything to Dr. Brothers about her condition of flowing at any time. Mrs. Stanger did not state to Dr. Woolley in November, 1940, at Idaho Falls that she had flowed excessively during the past four years. She did not go to Dr. Woolley for treatment for excessive flowing, but went to see him to find out why she was not building up as fast as she felt she should (R. 305-306).

Dr. H. Ray Hatch resides at Idaho Falls, Idaho, and is a physician and surgeon duly licensed to practice medicine and surgery under the laws of the State of Idaho, is a graduate of Rush Medical College, and has had a series of post-graduate work. He has been practicing since 1910 (R. 83-84).

He saw Mrs. Stanger February 12, 1940, and states from his examination he found her to be a very nervous girl on a rather high nervous and low emotional threshold. The emotional responses were out of proportion with the other condition. She complained of severe uterine bleeding. From examination the doctor found her to be suffering from unusual bleeding (R. 85). Dr. Hatch prescribed emotional nervous sedatives, tonics and various intravenous injections to bring up the blood supply in attempting to meet such factors that caused this bleeding. She did not respond to this usual treatment (R. 85). The bleeding continued at a rather alarming state, and the blood equality or oxygen carrying properties of the blood were effected until her hemoglobin was 48 percent. In order to meet this she was operated on, after being given blood transfusions, on July 9, 1940, and removed this bleeding uterus. The removal of the uterus made her sterile (R. 86).

The amount of Dr. Hatch's bill was between \$300 and \$400. Dr. Hatch treated her from February to July, 1940, and at the time of the trial she had been to see the doctor occasionally. Her treatment was active from February 12, up to December 31, 1940. She did not bleed after the operation (R. 86-87).

People of this latitude in good health range from 85 to 105 or 110 percent hemoglobin, and 48 percent is based upon

that normal standard. Dr. Hatch removed the uterus and the womb and the right ovary. The reason for the removing of the ovary was there were some cists, and the principal reason was that in the removal of the uterus to which the ovary is closely related, and the blood supply to the ovary was sufficiently interfered with owing to this fact, and there were some small cists, it was considered that it would be better to remove it than to leave it with inadequate circulation (R. 87-88). A cystic ovary does not necessarily cause bleeding. Dr. Hatch could not see that it caused bleeding in this case. The ovary was slightly cystic. The removal of the ovary in this case had nothing to do with the bleeding. The ovary would have been removed independent of this cist because of what the doctor considered the inadequate blood supply. The doctor did not think that its condition had anything to do with the bleeding (R. 88-89).

The fibrous condition of the uterus is a process that comes on unavoidably with women as they approach the change of life (R. 89). The uterus was removed to stop the excessive bleeding (R. 90). A fibrosis uteri with diffuse endometrial hyperplasia is an independent condition and occurs more frequently in women of advanced years, but also occurs in young women (R. 91). The bleeding was not continuous down to the time of the operation from the birth of the child. There was a long period that she was free from excessive flow either as to amount or duration for some time previous to my treating her (R. 92-92). The prolonged bleeding after child birth did not indicate fibrous uterus or cystic ovaries or chronic fibrous cervicitis. Bleeding that is prolonged after

child birth is what medical men call sub-involution (R. 93-94).

The treatment given Mrs. Stanger by Dr. Woolley after the birth of her last child up until the operation was for prolonged flow, and she had been helped by shots given her by the doctor (R.95). Follicular cists are not of much significance (R. 95-96). It is not an exceptional condition. Such condition may exist in a woman who might be well so far as the ovaries are concerned (R. 98-99). Toxemia pregnancy is not caused from excessive flowing (R. 100-101). Mrs. Stanger told Dr. Hatch about the train wreck she had been in, the fact of the accident and the effect of it, the wreck that occurred near Denver January 14, 1940 (R.106-107). From the examination made by the doctor before the operation the condition he found of the pelvic organs including the uterus did not warrant the operation independent of the bleeding (R. 107-108). The physical findings before the operation did not disclose enough definite abnormality to justify the operation if it had not been for the bleeding (R. 109).

APPELLANT'S TESTIMONY

Robert J. Lewis was engineer on the train at the time of the derailment. The derailment occurred at Houston. It is merely a side track for the loading of sugar beets (R.172-173). A broken wheel was found on the right side of the truck, the lead wheel on the rear truck on the rear end of the fourth car (R. 175). The four cars that remained attached to the engine were not wrecked. The train was late leaving Cheyenne and at the time of the accident (R. 176). The engineer did not observe anything any different in the way the train or engine rode. A tourist car was completely off the rails, a standard pullman and a tourist car and one other car that was a tourist car back at the rear end. Four cars had broken off the other portion of the train, and three of the four were off the track. The rails were spread at the point of the wreck. The engineer did not know when the wheels under the car or the wheel that broke were inspected or what the inspection consisted of (R. 176-177). The pullman car was leaning over at quite an angle, was not completely over. It went off the track to the right, the cars were lying at an angle. The ground at the point of the wreck was frozen. The engineer did not know where the trucks were that had been under the pullman car (R. 178-179).

The engineer did not know as to whether the gauge of the track was wide or tight at the point of the wreck. Could have been either. And when the engineer testified there was no defect he did not refer to that defect (R. 179). The web of the wheel was intact; the rim was gone. If the wheel broke and caused the wreck, the engineer was unable to state how far the cars

would move before they derailed. The engineer did not know and was unable to state whether the wreck caused the broken wheel or the broken wheel caused the wreck (R. 180-181). Spread track is where the gauge of the track is wider than the wheels. An engine of the type being used at that time weighs in the neighborhood of 200 and some odd tons. The baggage car and standard pullman is 90 or 100 tons. After the wreck the rails were badly twisted (R. 181-182). The engineer did not know whether the rails were broken or not (R. 183). They may or may not have been. The section foreman was not on duty on the day the wreck occurred, but went to the derailment after he had found out about it (R. 184). About 300 feet of rails was broken out (R. 188). No work had been done at the point of the wreck for over 30 days prior to the time of the wreck, only cleaning the snow out of the switch (R.189). As to what may have occurred to the track between the time the section foreman last inspected it and the time of the wreck he did not know. And as to the condition the track was in as to being a tight or wide gauge at the time of the wreck he did not know (R. 191-192). He did not know whether the gauge on the wheels of the engine was wide or tight. He did not know anything about the wheel that was broken. He did not know anything as to the age of the wheel (R. 191-192).

Dr. Hoyt B. Woolley, age 32, rendered the plaintiff, Mrs. Stanger, professional services first on November 10, 1939, (R. 213). The blood count at that time showed 42 percent hemoglobin (R. 217). He stated that he would not state that he told her that her condition had all cleared up (R. 218).

Dr. Woolley stated he did not examine Mrs. Stanger on December 14, 1939 (R. 220). There is no connection between the cystic ovary and the excessive flowing (R. 224). Dr. Woolley was a member of the staff of the Railroad physicians and had been since August, 1938 (R. 229). And was still a member of the medical staff of the Union Pacific at the time of the trial (R. 229-230). Dr. Woolley never made a pelvic examination of Mrs. Stanger, nor did he see any portion of the uterus that was removed. A person who was run-down and nervous having high nervous tension might contribute to excessive flowing. The first time Dr. Woolley saw Mrs. Stanger was November 10, 1939, and the last time he saw her was December 14, 1939 (R. 234-235). The records of Dr. Woolley only indicated two other visits by Mrs. Stanger. Dr. Woolley gave Mrs. Stanger shots and that they had the desired effect. Mrs. Stanger responded to that type of treatment and when Dr. Woolley last saw her this flowing had entirely cleared up. She responded to the treatment given, well, and the treatment given by Dr. Woolley stopped the excessive flowing, and she didn't have any flow on December 14, and she had cleared up and was building up physically (R. 235-236-237). Her hemoglobin count had built up during the thirty-day period from 42 to 68 percent. That would be an average response to this type of treatment. Excessive flowing comes from a legion of causes, and the condition found by Dr. Woolley in the pathological report was only one of the causes. And Dr. Woolley's statement that Mrs. Stanger had fibrosis uterus was based upon the history of the case (R. 240-241). Dr. Woolley never did during the time he treated

Mrs. Stanger suggest to her that she have an operation to remove the uterus to effect a cure (R. 250-242).

Dr. W. W. Brothers examined Mrs. Stanger at Idaho Falls, Idaho, pursuant to agreement of counsel October 9, 1941 (R. 245). Mrs. Stanger had been treated by hypodermic injections, which showed some improvement and she was feeling better, and at the time of the accident she was playing bridge when the car stopped suddenly and she was thrown suddenly against the edge of the table injuring her abdomen. This made her extremely nervous and caused her to flow the flow coming on immediately after the accident (R.247). Examination disclosed a woman quite intelligent, pulse regular, teeth good condition, tonsils good, no apparent infection of the larynx; no murmers, blood pressure 118/80 (R.247-248). The operation of Mrs. Stanger resulted in sterility. Dr. Brothers testified that if Mrs. Stanger had been his patient and had been responding to treatment other than surgery he would not operate if she was getting well. He would not advise an operation (R. 251). The excessive flowing does not always exist where the uterus has become fibrous. Dr. Brothers was on the medical staff of the Union Pacific Railroad Company. Mrs. Stanger told Dr. Brothers that she was thrown suddenly forward and struck across the edge of the card table (R.252-253). Dr. Brothers testified that it would be possible to have excessive flowing for a time, and that a violent blow across the abdomen would contribute to excessive flowing, that it might be a contributing cause, and there probably would be a connection between the two (R. 257). And to some extent severe nervous shock followed by physical injury and high nervous

tension would tend to some extent to increase excessive flowing (R. 255, 256, 257, 258). And that excessive flowing may be contributed to by being in a wreck such as Mrs. Stanger was in. That it might be contributed to, the excessive flowing, by injury, or might be contributed to by nervousness, but that would only be temporary. As to the length of time it may continue would depend to some extent upon the individual. It would depend on how long she was nervous (R. 258-259-260). The doctor could not say whether or not such increased flowing would continue during the time of the nervousness or the nervous tension existed (R. 260).

John A. Schroder, General Car foreman, Union Pacific, since 1920 in the car department. He testified the head four cars were on the rails when he arrived there. He found a broken wheel on the truck, the lead wheel on the right hand side (R. 267-268). The train consisted of a mail car, two baggage cars, a coach, pullman tourist, another coach, a pullman standard, and another car, eight cars altogether (R. 268-269). There was no derailment of the cars coupled to the engine. There were no broken parts inside of the Pullman car, no seats were broken, no windows broken, no loose bolts or anything of that sort. The top of the table was 27 inches from the floor of the pullman car. From the top of the seat to the top of the table, free height $10\frac{1}{4}$ inches (R. 270). The engine and train crew were present when Mr. Schroder got to the scene of the wreck. The engine crew consisted of the engineer and fireman. Both were there at that time. Mr. Lewis was engineer, did not know the fireman. The train conductor was Mr. Cross, did not know the names of either of the brakemen. He

did not see a pullman conductor or pullman porters. The trucks of the pullman car left the rails. He did not profess to testify as to what caused the wreck (R. 272-273). He does not know what else besides the broken wheel may have been wrong. There were six wheels under each end of the pullman car, twelve wheels altogether under a car. The trucks are generally cast in one unit, a unit which holds the wheels and axles; there are axles, wheels, journals in journal boxes all equipped with equalizers to equalize any shock in the road (R. 272-273). The front end of the pullman car was down in the ditch and lower than the other end. The grade of the barrow pit was about four feet deep. The broken wheel was on a car that had not been derailed (R. 274). He made no inspection of the track, and as to the gauge of the track he was unable to state. All of the wheels of all four cars that had derailed were off the rails. There was the same number of trucks under all of the cars as the pullman car had (R. 275-276). There was nothing disturbed inside of the pullman car; no seats torn loose, none of the berths had fallen down, no upper berths down, no pieces of metal or screws or bolts laying around, and no dirt on the floor. Just foot tracks, nothing shaken down or anything like that. The inside of the pullman car was in a normal condition (R. 276-277). Did not look for a card table; card tables are attached to the cars. There are wall brackets and there are two lugs; these lugs are placed in the wall and the table comes to its normal position with these lugs in the wall. There is a folding leg on the end of the table that is not attached to the wall. The top portion of the table is approximately $\frac{1}{2}$ inch thick (R.277-278). The wheel opposite, or the mate wheel of the broken wheel was on the

rail when Schroder arrived there. The broken wheel was not off the track, it was on the right side, referring to the movement of the train (R. 278).

The testimony of Dr. Cline, of the witness George O'Rullian, and Lee Walker, some of defendant's witnesses, is not set forth herein for the reason that their testimony is in connection with the plaintiff, A. G. Stanger.

Defendant's witness, Claude R. Pflasterer, metallurgical engineer for the Union Pacific, has been doing that work since 1921. He is a licensed professional engineer. There is no mistake but what the brake started on the back side, or the flange side of the wheel and extended to the outside. Wheels are inspected by Union Pacific wheel inspectors after they are made under certain specifications. This witness testified that the cause of the breakage in this wheel was due to internal stresses (R. 289). The wheel broke at or in the plate. The rupture was from the inside face, the flange side, outward. The edge of the outside is serrated, irregular (R. 291). This particular wheel was manufactured, rolled in 1928 (R. 292-293). Stresses such as were in this wheel develop during manufacture. The thing that caused this wheel to break was in there since the wheel left the mill (R. 295-296). He did not know as to whether the gauge was wide or tight at the time of the wreck. You can break steel in cold weather easier than when it is warm (R. 298). Climatic conditions do have an effect. Wheels do break because of friction, brake shoes, etc. He had heard of heat brakes and axles burning off and hot boxes. Any wheel may break because of these conditions. Wheels do break from friction heat and develop cracks (R. 298-299).

ARGUMENT

I.

(We will refer to the parties with respect to the position they occupied in the court below, as "Plaintiff" and "Defendant")

Under this point will be discussed the binding force and effect of findings. We urge upon the Court to bear in mind that the trial court heard this evidence, saw all of the witnesses and made his Findings of Fact and Conclusions of Law. We doubt that it is necessary for us to point out any of the rules of law pertaining to Findings, but we do so in order that we may discharge that full measure of duty that we owe to our clients. In this connection, we beg the indulgence of the Court to allow us to urge that Findings will not be disturbed on appeal if they are supported by sufficient evidence; that this Honorable Court will not weigh the evidence, but must accept the Findings made by the trial court, unless no reasonable man could draw the conclusions that the trial court did from the evidence.

Occidental Life Ins. Co. vs. Thomas, 107 Fed. (2d) 876.

Under the new Federal Rules, a Finding of Fact cannot be set aside unless it is "clearly erroneous" in that it is against the clear weight of the evidence.

United States vs. State Street Trust Co., 124 Fed. (2d) 948;

Fidelity & Deposit Co. of Maryland vs. Aberdeen Nat. Bank & Trust Co. 124 Fed. (2d) 973.

In so far as a finding of the trial judge who saw the witnesses depends upon conflicting testimony or upon credibility of witnesses, or so far as there is any testimony consistent with a finding, it must be treated as unassailable on appeal.

Wittmayer vs. United States, 118 Fed. (2d) 808.

In that same case this Court held that where the District Court's findings are based on conflicting evidence, such findings are presumably correct, and that unless some obvious error of law or mistake of fact has intervened, the findings will be permitted to stand on appeal.

Again, it has been held where a case is tried by the Court, its findings on questions of fact are conclusive upon appeal, no matter how convincing the argument is that upon the evidence the findings should have been different, unless there is no substantial evidence to support them, and the Appellant Court is bound by the lower court's findings unless "clearly erroneous."

Andrew Jergens vs. Conner, 125 Fed. (2d) 686;

McIntosh vs. Wiggins, 123 Fed. (2d) 316;

Corbett vs. Halliwell, 123 Fed. (2d) 331;

Walker vs. Lightfoot, 124 Fed. (2d) 3.

We urge upon the court that every question that is presented in this record there is either no conflict with respect to the Plaintiff's evidence, or there is merely a contradiction there-

of. So, the most the defendant can claim is that the judgment herein is one based upon conflicting evidence.

II.

The doctrine of *res ipsa loquitur* clearly applies in this case. That is so fundamental that it may well be designated as Hornbook Law.

In California Jurisprudence it is said:

“It has been long and continuously settled that, in an action by a passenger against a carrier for injuries received a *prima facie* case is established when the plaintiff shows that he was injured while being carried as a passenger by the defendant, and that the injury was caused by the manner in which the defendant used or directed some agency or instrumentality under its control. This rule has been announced by the cases again and again. The occurrence of the accident raises the presumption of negligence which throws upon the carrier the burden of showing that the injury was sustained without any negligence on its part; that is, that the injury was occasioned by inevitable casualty or some other cause which human care and foresight could not prevent or by contributory negligence of the plaintiff, unless the proof on the part of the plaintiff himself tends to show that the injury was occasioned by one of these causes. This rule is known as the doctrine of *res ipsa loquitur*. *Where, for example, the injury is caused by the derailment or overturning of a vehicle, upon the trial court it is only necessary for the plaintiff to prove the derailment or overturning and the injuries caused thereby. Having done this he may rest, for the presumption is that the derailment or overturning occurred through the negligence of the carrier, and the burden of proving that there has been no negligence is cast upon the latter. How the derail-*

ment or overturning occurred or what was its cause is no part of the plaintiff's case. The fact that the vehicle derailed or overturned is all that he need establish in order to recover for such injuries as he may have sustained."

4 Cal. Jur. page 980, Sec. 119.

In a late pronouncement by the Supreme Court of the State of California it is held with respect to the doctrine of *res ipsa loquitur*:

"It is clear that an inference of the truth of facts essential to a cause of action will support a judgment which may be rendered in accordance with such facts. 19 Cal. Jur. pp. 704, 717. And although to the comprehension of a trial judge, evidence to the contrary of such an inference may greatly preponderate, nevertheless the ultimate question of the weight that should be accorded to the evidence which may have been presented by the respective parties to the litigation is one for the exclusive original determination by the jury."

Gish vs. L. A. Ry. Corp. 13 Cal. (2d) 570, 90 Pac. (2d) 792.

Of course, that case was tried before the court and a jury, but such is not the case here. The court only tried the case here, and while it is true his finding would have the same force and effect as a verdict of the jury, we believe that it should be entitled to greater consideration.

The Supreme Court of Arizona said:

"The record discloses no proof of negligence by the plaintiff other than the proof of derailment and wreck.

The testimony of several witnesses was introduced by the defendant to establish the good condition of the track and the careful handling of the train, but whether the testimony of these witnesses was sufficient to rebut the presumption of negligence arising from the facts proven was a question of fact for the jury and would depend upon the weight given by the jury to the testimony of the witnesses, the effect as considered by the jury of the facts and circumstances surrounding or attending the derailment of the train, and on this issue the jury has found against the appellant."

Southern Pacific Co. vs. Hogan, 108 Pac. 240;
13 Ariz., 34; 29 L. R. A. N. S. 813.

Again it has been said:

"Under the doctrine of res ipsa loquitur, defendant must explain in some degree; that degree being sufficient to rebut the inference of negligence which comes to the aid of the plaintiff's case under the doctrine of res ipsa loquitur. Scarborough vs. Urgo, et al, 191 Cal. 341, 216 Pac. 584, supra. However, if there should be some evidence that could be deemed an explanation, then the whole case was one for the determination of the trial court as to whether or not the explanation was sufficient to balance or overcome the inference raised under the doctrine of res ipsa loquitur. If the finding of fact is based upon a reasonable inference, it is not within the power of this court to set it aside any more than it is within its power to set aside any other finding supported by the evidence."

Ireland vs. Marsden, 291 Pac. 912; 108 Cal. App. 632.

Again it has been held:

"Respondents further argue that, even conceding that doctrine (res ipsa loquitur) to be applicable, it

merely placed upon the defendants the burden of going forward with the evidence in explanation of their conduct and 'having explained their conduct the defendants have done all required of them by the doctrine.' Thereupon respondents apparently draw the conclusion that a directed verdict in their favor was proper stating that 'there is nowhere to be found a case holding that the presence of the doctrine prevents a directed verdict.' We are not called upon to decide the question of whether a directed verdict in favor of defendant should ever be granted in a case where the plaintiff has made out a prima facie case under the doctrine referred to. There is no doubt, however, the question of whether a defendant has made the showing required to rebut such prima facie case (citing authorities) is ordinarily one for the jury."

Karsey vs. City and County of San Francisco,
20 Pac. (2d) 751; 130 Cal. App. 655.

The law unquestionably is that whether or not the defendant has sufficiently explained the happening as required by the doctrine of *res ipsa loquitur* is a question of fact for the court or jury trying the case.

Michener vs. Hutton, 265 Pac. 238, 203 Cal. 604;
59 A. L. R. 480;

May Department Stores Co. vs. Bell, 61 Fed. (2d)
830;

Bourgnignon vs. Peninsular Ry. Co., 181 Pac.
669, 40 Cal. App. 689.

The Court of Appeals of the District of Columbia, in dealing with the doctrine of *res ipsa loquitur*, had this to say:

“Now, it is not for the court to determine the question of the truth of the explanation given; that is peculiarly the province of the jury. The plaintiff has proved a *prima facie* case of negligence; the defendant has offered an explanation which tends to show that there was no such negligence. This raises a disputed question of fact, proper to be passed upon by the jury, under instructions duly formulated by the court for the purpose. Unless, therefore, we are to adopt the theory that the plaintiff’s *prima facie* case only lasts until the defendant has offered some explanation, and that such explanation, whether true or false, destroys the presumption of negligence raised by plaintiff’s proof, and casts upon the plaintiff the necessity of proving by additional testimony in rebuttal, that, notwithstanding the explanation, there was in fact negligence on the part of the defendant, there is no escape from the conclusion that the case must be submitted to a jury. But we find no warrant in reason or in adjudicated cases for such a theory. No case has been pointed out which holds such a doctrine. No case has been pointed out where a verdict has been directed for the defendant because the defendant’s explanation has tended to controvert the presumption of negligence, and the explanation itself has remained uncontroverted by testimony in rebuttal. We find that in all the cases the question of defendant’s negligence, under such condition of the testimony, has been submitted to the jury for its determination.”

Kohmer vs. Capital Traction Co., 22 App. Dec. 181; 62 L. R. A. 875, at page 877 (middle right-hand column).

A jury is not bound to believe an explanation.

Texas & Pacific R. Co. vs. Carlin 189 U. S. 354, 23 S. Ct., 585, 47 L. Ed. 849.

In the last cited case of course, it was tried before a court

and jury, but here, as we have pointed out, our case was tried before the court only and the court found in our favor.

“It is argued here that the court should have directed a verdict for the plaintiff in error, and that error was committed in permitting a recovery to be had upon the theory that it was negligent in failing to have a flagman or gates at the crossing. Where a passenger is injured by a derailment of a train, there is a presumption of negligence on the part of the carrier, which, in the absence of some explanation or proof to the contrary, is sufficient to sustain a verdict against it for such derailment, is considered *prima facie* a breach of the contract to carry safely. *Patton vs. Texas & Pacific Ry. Co.*, 179 U. S. 663, 21 S. Ct. 275; 45 L. Ed. 361, *Gleeson vs. Virginia Midland R. Co.*, 140 U. S. 435; 11 S. Ct. 859; 35 L. Ed. 458, *Plumb vs. Richmond Light Co.*, 233 N. Y. 285 135 N. E. 504; 25 A. L. R. 685. The fact of the occurrence warrants the inference of negligence, and the doctrine of *res ipsa loquitur* comes into application. This means that, when the evidence is all in, the question before the jury is whether the preponderance is with the plaintiff. The explanations made, especially if given by interested witnesses, are for the jury. *Chicago vs. Irving*, 234 Fed. 562; 148 C. C. A. 328.”

Lehigh Valley R. Co., vs. Ciechowski, 10 Fed. (2d) 82.

In the case of *Sweeney vs. Erving*, the Supreme Court of the United States said, in dealing with this doctrine:

“In our opinion, *res ipsa loquitur* means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evidence

to be weighed, not necessarily to be accepted as sufficient; that they call for an explanation or rebuttal, not necessarily that they require it; that they make a case to be decided by the jury, not that they forestall the verdict * * * When all of the evidence is in, the question for the jury is whether the preponderance is with the plaintiff."

228 U. S. 233; 33 S. Ct., 416; A. C. 1914 D, 905
57 L. Ed. 815;

In concluding this portion of our discussion, we call attention to the fact that there are many questions upon which the Railroad Company offered no explanation whatever. For instance, there is no evidence in this record that in the more than ten years that this wheel was used that it was ever inspected. The only explanation that they attempted to make was that of the purported expert, an employee of the Railroad Company and an interested witness, Claude R. Pflasterer (R. 276). This witness testified merely that he made an analysis of the broken parts of this wheel and that the defect was a stress that had been in there since its manufacture; that what caused the wheel to break was there during the manufacture (R. 290). As we shall presently see, the manufacturer of equipment for a common carrier is its agent, and the common carrier is responsible for the negligence of the manufacturer. That being true, there is no explanation whatever in this case of why the manufacturer did not discover this defect or what care was exercised by it, if any, to discover it. There isn't any evidence in this record even that the manufacturer was a reliable one. Evidence of an employee that he made an inspection does not overcome the doctrine of *res ipsa loquitur*.

Volkmar vs. Manhattan R. Co., 134 N. Y. 418; 31 N. E. 870; 30 A. L. R. 678;

Davis vs. Paducah, R. & L. Co., 68 S. W. 140, 113 Ky., 267;

Chicago, M. & St. P. R. Co., vs. Irving 234 F. 562.

III.

We next pass to a consideration of opinion evidence destroying the question of fact or converting the question into one of law where otherwise there would be a question of fact involved. In the first place, let us point out that opinion evidence can never destroy a question of fact, and opinion evidence is not binding upon a trier of fact. As to whether opinion evidence will be accepted or rejected is for the trier of facts.

If the rule of *Erie R. R. Co. vs. Tompkins*, 304 U. S. 64, 82 L. Ed 1188, 58 S. Ct. 817, 114 A. L. R. 1487, is adhered to, then the rule obtaining in Idaho where this case was tried with respect to opinion evidence would control here, and in this connection, the Supreme Court of Idaho has held that an expert's testimony as to his opinion is not evidence of a fact in dispute, but is advisory and admissible only to assist triers of fact to understand and apply testimony of other witnesses.

Evans vs. Cavanagh, 58 Ida. 324; 73 Pac. (2d) 83;

Ninstad vs. Wenton Lbr. Co., 99 Pac. (2d) 52; 61 Ida. 1.

But at any rate, the weight to be given expert evidence is entirely left to the court or jury trying the case and it is not binding upon a trier of fact in any respect.

Burns vs. Osborn-Fitz-Patrick Finance Co., 282
Pac. 419, 101 Colo. 680;

20 A. Jur. 1059, Sec. 1208;

So. Pac. Co. vs. City of Los Angeles, 55 Pac. (2d)
847; 5 Cal. (2) 545;

City of Elsinore vs. Temescal Water Co., 97 Pac.
(2d) 274; 36 Cal. App. (2) 116;

May vs. Farrell, 271 Pac. 789;

10 C. J. 972, Sec. 228;

Anderson vs. B. & O. Ry. Co., 96 Fed. (2d) 796;

22 C. J. 728.

The Supreme Court of the United States, in dealing with opinion evidence generally, speaking through Mr. Justice Cardoza said:

“But plainly opinions thus offered, even if entitled to some weight have no such conclusive force that there is error of law in refusing to follow them. This is true of opinion evidence generally whether addressed to a jury (citing authorities) or to a judge (citing authorities) or to a statutory board.”

Dayton Power & Light Co. vs. Public Utilities
Comm. 292 U. S. 290; 54 S. Ct. 647; 78 L. Ed.
1267.

In Cal. Jur. it is said:

“However, it is well established that a jury, or a judge sitting as a jury, is not concluded by the testimony of experts. The province of such testimony is only to aid in coming to a conclusion; and does not exclude consideration of other evidence which is pertinent to the issue involved. Even if several competent experts concur in their opinions, and no opposing opinion is offered, the jury are still bound to decide the issue upon their own judgment, assisted by the statements of the experts. Obviously, the fact that a witness is an expert does not cause additional significance to attach to his testimony in regard to self-evident facts. It is for the trial court, and not the court of review, to determine the weight to be given to such evidence, and when there is a conflict between scientific testimony and testimony as to facts, the jury or trial court must determine the relative weight.”

10 Cal. Jur. 972.

“Here the jury was not bound to accept the expert testimony given by appellant’s witnesses. (Michener vs. Hutton, *supra*, quoting approvingly Volkmar vs. Manhattan Ry. Co., 134 N. Y. 418; 31 N. E. 870; 30 A. St. Rep. 678.)”

Brandes vs. Rucker-Fuller Desk Co., 282 Pac. 1009, 102 Colo. 221.

The last cited case involved the doctrine of *res ipsa loquitur* and it was squarely and directly held that the inference of negligence arising from it could not be overcome by expert or opinion evidence. The question there involved was an allegedly latent defect in a part of a motor vehicle. We submit that that case is directly in point in our favor here.

IV.

The law undoubtedly is that whoever manufactures the equipment for a common carrier of passenger is regarded as the agent of the common carrier, and the fact that it was manufactured in an independent establishment makes no difference and the negligence of such manufacturer is chargeable to the common carrier, or differently stated, the purchase of defective machinery from another is no defense.

It has been held in an English case that:

“In an action against a railway company for compensation for injuries received by the plaintiff by the breaking down of a bridge over which he was passing in a passenger train, it was held that it was a proper question for the jury whether the defendant had engaged the services of competent engineers, who had adopted the best methods and had used the best materials, and that, if the defendants had done so, they would not be responsible; but that the mere fact of their having engaged the services of such a person would not relieve them from the consequences of an accident arising from a deficiency in the work.”

Grote vs. The Chester and Hollyhead Ry. Co.,
1848 2 Ex. 251; 154 Eng. Rep. 485.

This case by no means is the full measure of the length that the English court has gone on this question.

“The coach proprietor is bound to convey his passengers in a road-worthy vehicle and if an accident happened from a defect in the construction, the proprietor is liable, although the defect be out of sight and not discoverable upon ordinary examination.”

Sharp vs. Grey, 2 Moo. and S. C. 620; 21 L.J.C.P. 45; 9 Bing. 457; 131 Eng. Rep. 684.

It is stated in connection with this case and where the above rule of law was laid down, to-wit:

“Assumpsit against a coach proprietor and common carrier, for failing in his undertaking to convey the plaintiff safely from Chertsey to London. The axel-tree of the defendant’s coach broke on the journey whereby the plaintiff was thrown off, his limbs fractured, and considerable loss and expense incurred in his cure. It appeared that the axeltree was an iron bar, which, excepting the arms projecting into the wheels, was encased in a frame of wood consisting of four pieces bound together by clamps of iron. The clamps were fastened with screws. Before the journey the defendant’s servants had examined part of the vehicle in the usual way, when no defect was obvious to the sight; but upon investigation after the accident, a defect was discovered in that portion of the iron bar which, being embedded in the woodwork, could only be examined by unscrewing the iron clamps and taking off the wooden frame.”

Sharp vs. Grey, *Supra*.

This was held not to be any defense. In the case at bar there never was an examination of this car or its wheels, so how can it be said that there has been a compliance with the law that imposes the duty of careful inspection and maintenance upon the common carrier? A plea wherein it was averred that a locomotive, the crankbeam of which broke, was purchased from competent manufacturers, although it was not made by the railway company, was held by the Irish court to be demurrable, it being stated:

“Their plea does not contain any averment as to the care and skill applied in the manufacture of the engine, nor as to the care and skill exercised by (the company) in the selection or inspection of it. All the averrance and their pleas are quite consistent with gross culpable carelessness on the part of the manufacturers and with gross and culpable negligence on the part of the purchase of it from the manufacturers.”

Burns vs. Cork B. Ry. Co., 13 Irish C. L. Rep. 543.

The same thing can be said in the case at bar, all of the evidence of the defendants is quite consistent with gross and culpable negligence of the defendants or the manufacturer because there is no evidence of an inspection by defendants at any time since the wheel was put into service more than twelve years prior to the time that the accident occurred, or any care on the part of the manufacturer during the process of fabrication of the wheel.

We do not have to cross the Atlantic Ocean for authority. There is an abundance of it here in the United States, as we shall presently see. The Supreme Court of California has held:

“When a passenger is injured by the derailment of a train, the fact of such an accident raises the prima facie presumption of negligence, which the railway company has the burden of overcoming by clear and explicit proof that the accident could not have been avoided by the utmost practical care and diligence, and that it proceeded from something against which no human prudence or foresight on the part of the company could provide. 3 Thompson on Negligence (2nd Ed.) Prs. 2909, 2910; Fairchild vs. California Stage Company, 13 Cal. 599, 604; McCurrie vs. Southern Pacific Company, 122 Cal. 588, 561; 55 Pac. 824.

That such is the law is admitted by the appellant. Upon the state of the evidence, however, it claims exoneration in the instant case. It relies first upon the stipulated fact that it purchased the rail forming a part of its track from a manufacturer of reputation, and, second, that after employing all reasonable care and skill for the purpose of detecting any weakness in the rail, the defect which was the cause of the accident remained undisclosed and, in fact, could not be discovered by means of the examination which the defendant made. The precise question we are here confronted with was elaborately considered by the Supreme Court in this State in *Treadwell vs. Whittier*, 80 Cal. 574, 22 Pac. 266, 5 L. R. A. 598, 13 Am. St. Rep. 175. So completely is the matter there discussed and so thoroughly are the authorities examined and quoted from that the decision may be said to be the leading case in California upon the subject. It was there said (80 Cal. 588, 22 Pac. 270, 5 L. R. A. 598, 13 Am. St. Rep. 175). 'The doctrine of the American courts is still more strict and explicit, and the general current of the authorities is that the carrier of passengers is bound to the utmost care and diligence of very cautious persons, and is responsible for any, even the smallest negligence; holding their undertaking to be to carry their passengers with safety as far as human care and foresight can go.' It is settled by that decision, and seems to be well established by the cases therein examined and cited that appellant was not excused from the degree of care and diligence pointed out, by the fact that the rail in use was constructed by a competent and skilled manufacturer, from whom it purchased it. The manufacturer was its agent or servant in the rolling of the rail, and it is responsible for any want of care of the maker. The obligations of care and foresight rested upon the defendant using the rail, and it can not shift it from itself to another person. Whether the rail was manufactured in the workshop of the defendant by agents employed for that purpose or by a manufacturer engaged in the business of sup-

plying such articles for sale, defendant was bound to see that in its making no care or skill was omitted. 'When such care and skill has been exercised, the defendants duty in this respect has been discharged. If, on the other hand, a defect exists in the construction which might have been detected and remedied, they are answerable for the consequences' *Hegman vs. Western R.R. Corp.*, 16 Barb (N. Y.) 353, 356, (citing approvingly *Treadwell vs. Whittier*, *Supra*, 80 Cal. 588, 22 Pac. 270, 5 L. R. A. 598, 13 Am. St. Rep. 175). Following the *Treadwell* case, the Supreme Court has steadfastly adhered to the doctrine there laid down that in this state a common carrier is responsible for defects which, even though not discoverable after the instrumentality came into its possession, could have been discovered by the most careful and thorough examination during the process of manufacture. *Siemens vs. Oakland S. L. & H. Ry.*, 134 Cal. 494, 499; 66 Pac. 672; *Jacobi vs. Builders' Realty Co.*, 174 Cal. 708, 710; 164 Pac. 394; L. R. A. 1917E, 696; *Treadwell vs. Whittier*, *Supra*, 80 Cal. p. 594 et seq., 22 Pac. 266, 5 L. R. A. 498, 13 Am. St. Rep. 175. In view of the above rule so strongly drawn in this state, we feel that the lower court could not say, as matter of law, that the defendant had successfully met the burden imposed upon it by plaintiffs' *prima facie* case. Defendant's only witness as to the latent defect and its cause never had any practical experience in the manufacture of or science of making rails. So far as the record discloses he was never in any way connected with such work. There was no evidence as to the processes or care employed in the rolling mills to eliminate slag from the rails, or as to tests, or of examination in their manufacture. The effect of the evidence, as we view it, is that, after the rail was made and purchased by defendant, such defects in its inner fabric are not discoverable, cannot be, and, as matter of fact, in the instant case, were not, disclosed by "the usual and

ordinary" methods of inspection pursued by defendant."

Morgan vs. Southern Pacific Co., 187 Pac. 74, 76, 77;

45 Cal. A. 229.

We could quote from the case of Siemsen vs. Oakland, S. L. & H. Ry., and Treadwell vs. Whittier, but that would be merely to multiply authorities. We may say, however, that the Treadwell vs. Whittier case is one of the leading cases throughout the United States and has been repeatedly cited with approval.

Now, then, let us see how the facts of the case before this honorable court fit into the situation here. The railroad company there was not excused for a defect that was caused by or due to the neglect of the manufacturer. And it was stipulated that the manufacturer of the rail was a reputable one. There was no attempt in the case at bar to show that the car or wheel in question were bought from a reputable manufacturer, the identity of the manufacturer is unknown. There is not the slightest intimation in the case at bar as to what care, if any, the manufacturer used in making this car wheel. There is not any evidence whatever that Mr. Pflasterer, as the California court said, ever had any connection with the manufacture of the car or wheel, or any car or any wheel, or knew anything about it. In other words, the language of the California court:

"Defendant's only witness as to the latent defect and its cause never had any practical experience in the manufacture of or science of making 'wheels.' So far as the record discloses he was never in any way con-

nected with such work. There was no evidence as to the processes or care employed in the making of "wheels" to eliminate 'stresses' from 'wheels,' or as to tests, or of examination in their manufacture."

The Supreme Court of the United States held:

"Persons transported in such conveyances contract with the proprietor or owner of the conveyance and not with their agents as principals, and the question of the liability of the proprietor or owner is wholly unaffected by the fact that the defective ship, car, engine or other apparatus was purchased of another, if the defect was one that might have been discovered by any known means."

Steamship City of Panama vs. Phelps, 101 U. S. 453;

25 L. Ed. 1061, 1065 (upper left hand column).

So far as the evidence goes in the case at bar, the defect in this wheel could have been readily discovered during the process of manufacture. Or after it was manufactured and before it was placed in service more than twelve years before this accident occurred. To say nothing of the fact that not even the slightest inspection was ever made of this wheel or car after it was placed in service and before this wreck occurred.

It was held in *Hegeman vs. Western Ry. Co.*, 616 Barb. 353, 13 N. Y. 9, 64 Am. Dec. 517, and approved in *Treadwell vs. Whittier*, *supra*, that the failure to discover a defect in an axle which could have been discovered only by bending the axle, constituted negligence.

A railroad company may not escape liability by show-

ing that a passenger was injured as a result of a defect in a car, not owned but being used by it at the time.

Morgan vs. Chesapeake & Ohio Ry. Co., 105 S. W. 961; 127 Ky. 433; 15 L. R. A. N. S. 790; 16 Am. Cas. 608.

V.

The defendant seeks to palliate its culpability by reason of Mrs. Stanger's prior alleged weakened or diseased condition.

We submit, in the first instance, that the trial court was fully warranted in finding that her present condition was due entirely to these injuries she sustained or received, at the time this wreck occurred. And that there is ample evidence in the record to justify and support such a finding. It should be remembered that even the Railroad Company's doctor admitted under cross-examination, that injury or accident, could have caused her condition. We refer to Dr. Brother's testimony (R. 257). It is indeed strange that if Mrs. Stanger was in substantially perfect health and had been for several months prior to the accident and before she was injured, as she so testified, and was in better condition than she had been for a long time, and had been in perfectly normal health (R. 133-134) that immediately and in fact at the scene of the wreck, while standing upon the ground after she had been assisted from the wrecked car, this excessive flowing of blood commenced and continued until after she had been operated on by Dr. Hatch and her uterus removed (R. 132-133). The trial judge heard the testimony of this witness and observed her demeanor upon the witness stand, as he did all of the wit-

nesses testifying in this case. The trial court believed the testimony of Mrs. Phyllis Stanger. And we submit that there is ample testimony of other witnesses to support the testimony of Mrs. Stanger.

“Increased injuries sustained by a plaintiff by reason of her diseased condition at the time of the accident occurring from the defendant’s negligence does not constitute special damage which must be pleaded in order to be recovered. Where the plaintiff at the time of an injury, by reason of defendant’s negligence, was suffering from disease and such injury hastened the development of the disease and aggravated the same, she was entitled to recover for such increased injury.”

(Syl. 3 and 4).

Campbell vs. Los Angeles Traction Co., 137 Cal. 565; 70 Pac. 624.

This case also holds that the weak, sick, infirm and halt, have the same right to the protection of the law against hurt or injury that the healthy and strong may demand.

We do not, however, for one second concede or admit that this is a case where there was merely an aggravation of a diseased condition. We submit, and most earnestly insist, that the trial court correctly found that the defendant was responsible for the injuries Mrs. Stanger sustained and for the resulting operation, and her present condition.

This court held that the following instruction correctly laid down the law :

“You are instructed that if you find from the evidence that the plaintiff received the injuries

complained of by reason of defendant's negligence, alleged in the complaint, and that at the time of the reception of such injuries the plaintiff had been suffering from some disease, and further find that such injuries hastened the development of the disease, and that to be without the fault of the plaintiff the present condition, whatever you may find that to be, has resulted from such injuries, then I instruct you that the plaintiff is entitled to recover such damages as you may determine he has sustained from the injuries."

Southern Pacific Company vs. Cavin, 144 Fed. 348 at page 351.

Again it has been held that:

"Where a plaintiff was in good health prior to a personal injury due to defendant's negligence, but the shock of such injuries produced delirium tremens by reason of which and of his acts during delirium tremens his recovery from the injury was retarded and rendered less complete, the fact that his susceptibility to the disease was the result of his own voluntary acts, cannot be considered in mitigation of damages, the defendant is liable for all damages resulting from the disease, as well as from the original injury."

(Syl.)

Magurire vs. Scheen, 117 Fed. 819; 54 C. C. A. 642; 59 L. R. A. 496.

The Supreme Judicial Court of Massachusetts has held:

"If her previous habits had been such as to lessen the probability of her complete recovery or to prolong or to aggravate the suffering caused by her injury, that fact could be shown in mitigation of damages."

Sullivan vs. Marin, 175 Mass. 422; 56 N. E. 600;

See also 1 Thompson on Negligence, Sec. 150.

The question of damages is one for the trial court and should not be disturbed in this court, amount of damages being a question of fact. This court is not the trier of facts. This court is without the advantage of hearing the various witnesses testify and is unable to and does not observe the demeanor of the various witnesses on the witness stand or their demeanor or manner of testifying. These, are among some of the many regular, sound and established principals of jurisprudence, why the question as to the amount of damages should be settled in the trial court.

We submit that the argument of defendant's counsel appearing at page 43 of their brief is wholly inapplicable to the case now before this court. It seems to us that counsel feels himself in the position of the proverbial drowning man grasping at a straw. Counsel cites from 55 Corpus Juris (brief of appellant, page 43), in the same work we find this textual statement.

“The fact that plaintiff is afflicted with a disease or weakness which has a tendency to aggravate the injury will not prevent defendant's wrongful act from being regarded as the proximate cause. 25 C. J. page 479.”

The Supreme Court of the State of Idaho has laid the law down to be, and by the way, defendant's counsel relies upon this case, that:

"If you find from the evidence that the plaintiff was caused to fall by a defect in the sidewalk negligently permitted to exist by the defendant, the defendant is responsible for all ill effects which naturally and necessarily follow the injury in the condition of health in which plaintiff then was at the time of such fall, and it is no defense that such injuries may have been aggravated and rendered more difficult to cure by reason of plaintiff's state of health at the time, or that by reason of latent disease the injuries were rendered more difficult to cure by reason of plaintiff's state of health at that time, or that by reason of latent diseases the injuries were rendered more serious to her than they would have been to a person in robust health."

Jones vs. City of Caldwell, 20 Ida. 5, 12-13; 116 Pac. 110; 48 L. R. A. N. S. 119.

Counsel cites this case in the quotation contained on page 44 of appellant's brief; so we contend with respect to the matter of any ill health on the part of the plaintiff, Mrs. Stanger, that this was merely a question of fact for the lower court, and the lower court having passed upon this question and having found in favor of the appellee, such finding by the lower court should not be disturbed here.

VI.

We contend further that the question of damages under the rules laid down by this court and by the Supreme Court of the United States is a matter for the trial court and will not be disturbed by this court on appeal.

The Supreme Court of the United States has said:

“Whether the verdict was excessive is not our province to determine on this writ of error. The correction of that error, if there were any, lay with the court below upon a motion for a new trial, the granting or refusal of which is not assignable for error here. As stated by us in *Aetna Life Insurance Company vs. Ward*, 140 U. S. 76, 11 S. Ct. 720, 35 L. Ed. 371, ‘It may be that if we were to usurp the functions of the jury and determine the weight to be given to the evidence we might arrive at a different conclusion. But that is not our province on a writ of error. In such a case we are confined to the consideration of exceptions, taken at the trial, to the admission or rejection of evidence and to the charge of the court and its refusals to charge. We have no concern with questions of fact, or the weight to be given to the evidence which was properly admitted.’ 140 U. S. 91 (35:339 citing numerous cases), *Ny. L. Erie and Western R. R. Co. vs. Winter* 143 U. S. 60; 12 S. Ct. 356; 36 L. Ed. 71. (This case cited and the language approved by this court in *Southern Pacific Co. vs. Cavin*, *Supra*.)

The Supreme Court of the United States again said:

“The argument on behalf of the plaintiff in error proceeds upon the assumption that this court may review the evidence as to negligence and as to the damages recoverable, and may reverse the judgment if the court is dissatisfied with the findings of the jury. This, however, is not the province of the court upon writ of error. If there was evidence proper for the consideration of the jury, the objection that the verdict was against the weight of the evidence, or that the damages allowed were excessive, cannot be considered. (Citing numerous cases).”

Herencia vs. Guzman, 219 U. S. 44; 31 S. Ct. 135; 55 L. Ed. 81, 82.

This court has held in *Gates vs. General Casualty Company of Am.*, 120 Fed. (2d) 925, 927.

“Appellants contend that the court’s finding of misrepresentation and concealment is not sustained by the evidence. On this issue appellants must show the court’s findings are ‘clearly erroneous.’ Due regard being given to the opportunity of the trial court to judge of the credibility of the witnesses,” all but one of whom was heard by that court.”

“Referring to Rule 52 (A) Federal Rules of Civil Procedure, 28 U. S. C. A. following Sec. 723 C.

To the same effect see *Gary Theater Company vs. Columbia Pictures Corporation*, (7th Cir.) 120 Fed. 891.

Again this court has said:

“There is sharp conflict in the evidence, and of course it is not incumbent upon this court to reconcile such conflict or to weigh evidence; our sole duty is to determine whether there is any substantial evidence to support the findings of the court below.”

Babbitt Brothers Trading Co. vs. New Home Sewing Machine Co., 62. F (2d) 530, 533.

See also *Champion Spark Plug Co. vs. Reich* (8th Cir. 1941) 121 Fed. (2d) 769, 772.

“If the findings of the trial court have substantial support in the record, we are not warranted in overturning them unless they are found to be clearly erroneous, and in the determination of this question, we must give due regard to the opportunity at the trial to judge the credibility of the witnesses.”

Federal Rules of Civil Procedure, Rule 52 (A) 28

U.S.C.A. following Sec. 723 C. Grey vs. United States, 8th Cir., 109 Fed. (2d) 728.

The Supreme Court of the United States has held that:

“The excessiveness of an award for pain and suffering of a deceased railway employee in an action brought under the Federal Employers’ Liability Act is a question of fact which is not open to revision in the Federal Supreme Court on writ of error to a state court.”

St. Louis Iron Mountain and Southern Railway Co.
vs. Craft, 237 U. S. 648; 59 L. Ed. 1160; 35
S. Ct. 704. (4th Syl.)

From the same case we quote further:

“Finally, it is said that the award of \$5000.00 for damages for pain and suffering even though extreme, for so short a period as approximately thirty minutes, is excessive. The award does seem large, but the power, and with it the duty and responsibility of dealing with this matter rested upon the courts below. It involves only a question of fact, and is not open to reconsideration here.”

Citing numerous cases. St. Louis I. M. and S. Ry.
Co., vs. Craft, *supra*.

Again the Supreme Court of the United States held:

“But a case of mere excess upon the evidence is a matter to be dealt with by the trial court.”

Southern Railway-Carolina Division vs. Bennett,
233 U. S. 80; 58 L. Ed. 860, 34 S. Ct. 566.

“The contention that the verdicts are against the

weight of the evidence cannot be considered, as this court can go no further than to determine whether there is substantial evidence to support them. Nor is it the province of this court to determine whether the verdicts are excessive. That question lay with the court below upon the motion for a new trial."

Grand Trunk Western Ry. Co. vs. Heatlie, 48 Fed. (2d) 759.

Among other cases cited in support of the above is:

"The trial court's judgment is based upon conflicting evidence. After a careful examination of the record we are unable to say that the court's findings are clearly erroneous. Rule 52 (a), Federal Rules Civil Procedure, 28 U. S. C. A. following Sec. 723c. We think it unnecessary to discuss the evidence in detail. We are impressed, as undoubtedly was the trial court, with the testimony of the witness Parks relative to the building up of the land in dispute by flood waters of the river * * * The findings of the trial court fall within the familiar rule, that where based upon conflicting evidence they are presumptively correct, unless some obvious error of law, or mistake of fact, has intervened, they will be permitted to stand. *Silver King Coalition Mines Co. vs. Silver King C. M. C.*, 8th Cir., 204 Fed. 166, 177 Ann. Cas. 1918B, 571. The provisions of the new procedural rules that the findings of fact of the trial judge are to be accepted on appeal unless clearly wrong (Rule 52 (a), 28 U. S. C. A. following Sec. 723 c), is but the formulation of a rule long recognized and applied by courts of equity. *Guilford Const. Co. vs. Biggs*, 4 Cir., 102 Fed. (2d) 46, 47. As was said by Mr. Justice Holmes in *Adamson vs. Gilliland*, 242 U. S. 350, 353, 37 S. Ct. 169, 170, 61 L. Ed. 356 (citing *Davis vs. Schwartz* 155 U. S. 631, 636, 15 S. Ct. 237, 39 L. Ed. 289), the case is preeminently one for the application of the practical rule, that so far as the findings of the trial

judge who saw the witnesses 'depends upon conflicting testimony or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable'."

Wittmayer vs. United States 118 Fed. Rep. (2d)
808, 810, 811.

"The only real issue in the case is therefore whether the storms which this ship met caused any part of the damage, and how much; these are questions of fact and the judge has found them against the defendant. The record would not justify us in saying that his finding was "clearly erroneous," Rule 52 (a), Federal Rules of Civil Procedure, 28 U. S. C. A. following Sec. 723 c, even though we should not have reached the same result ourselves, and we might well have found exactly as he did. True, it would seem as though the sounding of a ship in an ordinary seaway might account for much—perhaps all—of this kind of damage; but the truth seems to be otherwise for rubber cargoes come through quite regularly with good out-turn, unlike that at bar. This being datum, it is impossible to see what else but the storms could have so injured this parcel, for the stowage was good; and the judge was certainly not bound to accept the defendant's expert testimony."

Hecht, Lewis & Kahn, vs. New Zealand Insurance Co., 121 Fed. (2d) 442.

Counsel for appellees feel constrained to make this observation of the numbered paragraphs appearing in appellant's brief contained on pages 55 and 56. R. 19 refers to a portion of the findings of fact and conclusions of law. R. 43, if we interpret clearly refers to notice of appeal and petition for approval for supersedeas and stay on appeal, and does not

refer to the evidence except as the court found the same from the testimony which we submit conclusively shows that the plaintiff, Phyllis Stanger was struck in the abdomen and this is undisputed (R. 127-128).

Answering paragraph II, the evidence is conclusive that the operation performed upon Phyllis Stanger in July following the January in which she was injured was caused by the injuries she sustained in the derailment, and the findings of the court and the record in this case amply supports the same. Appellant's statement number III is positively misleading, and just to the contrary. The evidence is that prior to this derailment and the injuries received Phyllis Stanger was not nervous, and in better health than she had been for several years prior, she was able to rest and sleep at night, and that in support of her own testimony is the testimony of Dr. Hatch, stating as to her nervous condition at the time he saw her 7 months after this accident occurred.

Again in answer to paragraph IV, the evidence on the entire record is to the contrary absolutely. The sterility of Mrs. Stanger was directly and proximately caused by the injuries she sustained at the time of the wreck or derailment with its resulting injuries.

In answer to paragraph V we submit upon the face of it, it is begging the issue, is silly, and without foundation in truth and absolutely contrary to the testimony and the record in this case.

Likewise in paragraph VI there is no doubt as to what appellant's counsel would desire the record to show, in this

case. We submit upon the record that following this accident, the same day it occurred, Mrs. Stanger was given treatment by a Railroad doctor whom the plaintiff testified she did not know. That she was unable to sleep on the pullman car on the trip from Denver to Houston, and after she arrived at Houston, Texas, she remained most of the time in bed, as she did throughout the remainder of the trip and after she arrived at home. After the trip she remained in bed at home for many weeks and months following the time the derailment occurred.

And paragraph VII again is likewise a pure conclusion on the part of counsel for appellant. There is positively nothing in the record to show that the court did not differentiate between the condition of the plaintiff before the derailment and the resulting injuries and the condition that existed after the same.

There is another matter that thus far appellee has not called to the attention of this honorable court, and that is this: The engineer of this train was the only member of the train or engine crew that was called by the Railroad Company to testify in this case. The train and engine crew consisted of the engineer and fireman, a train conductor, and two brakemen. This was admitted by appellant's witness, Mr. John A. Schroder (R. 271-272) under cross-examination. No reason was given by the appellant here for not calling these witnesses. They knew who they were and are, and they were their own hired employees. Yet the trial court and this honorable court is left in the dark as to what these witnesses would have said had they been called to testify. And we make this inquiry, is it reasonable to assume that they would have testified favorably

for the Railroad Company and yet they did not call them? Or is there another presumption that arises from a failure of a party to call witnesses who were in the position of their fireman, who was with engineer Lewis on this train, and the train conductor and their two brakemen?

There was a fireman on the same engine with defendant's engineer Lewis. The defendant knew his name. What would he have said as to how the engine rode passing over the particular piece of track where this wreck occurred, had he been called by the defendant to testify?

There is a presumption that arises from the failure of a party to produce evidence which is within his knowledge, which he has power to produce, and which he would naturally produce if it were favorable to him, gives rise to an inference that if such evidence were produced it would be unfavorable to him.

22 C. J. Sec. 53 p. 111;

Kirby vs. Tallmadge, 160 U. S. 379, 16 S. Ct. 349,
40 L. Ed. 463;

And cases cited under footnote 54.

See also:

22 C. J. p. 115 Sec. 56;

10 R. C. L. Sec. 32 p. 884, and cases cited therein.

The Supreme Court of the State of Idaho has said regarding this matter:

“When evidence tends to prove a material fact imposing a liability on a party, and he can produce evidence rebutting the case made against him, if it is not founded on fact but refuses to do so, it must be presumed that the evidence, if produced, would operate to his prejudice and support his adversary * * *

Garrett vs. Neitzel, 48 Idaho 727, 733; 285 Pac. 472;

The Supreme Court of the State of California has adopted with approval the following language:

“It is a well settled rule that when the evidence tends to prove a material fact which imposes a liability on a party, and he has it in his power to produce evidence which from its very nature must overthrow the case made against him if it is founded on fact, and he refuses to produce such evidence the presumption arises that the evidence, if produced would operate to his prejudice and support the case of his adversary.”

Bone vs. Hayes, 99 Pac. 172, 175.

In this case numerous authorities are cited.

Missouri Pacific Ry. Co. vs. Kennett, 99 Pac. 269, 79 Kan. 232;

Lenover vs. Beckman, 142 Wash. 98, 252 Pac. 533.

We earnestly submit that the failure of the Railroad Company, appellant here, to call the fireman and at least the train conductor, who would know as to the condition of the inside of the train, should receive the careful consideration by this Honorable Court that the law says must be applied.

VII.

There is yet one more point to which we want to direct the attention of the Court, and that is the power or the rule of this court to overrule or set aside the judgment or opinion of a trial court on motion for a new trial. It has been uniformly held by this court that this court will not disturb a judgment where the trial court has either granted, or denied a motion for a new trial. Such was the procedure in the case at bar. The appellant duly made and presented to the court its motion for a new trial and after argument of counsel and due consideration by the court the motion for new trial was denied. Counsel for appellant in specifications of error and in specification No. 2, assigns as error the refusal of the trial court to grant its motion for a new trial, and as we have heretofore indicated, this court has uniformly held that if there is substantial evidence to support a judgment, that this court will not reverse a trial court in refusing to grant a new trial, and we call first to the attention of the court an Idaho case that was decided by this court on the point that we are now raising and discussing with the court and this court held in that case as follows:

“The denial of a motion for a new trial in the federal court is within the discretion of the court, and where that discretion has been exercised, and there is evidence to support the judgment, as in this case, a motion is not reviewable on Writ of Error.”

C. & M. St. P. R. Co. vs. Chamberlin 253 Fed. 439.

In support of the above announced doctrine, this court in the last cited case cites,

Pickett vs. U. S. 216 U. S. 456-461; 54 L. Ed. 566.

We quote again,

“Granting or denying a motion for a new trial is discretionary with the trial court; only an abuse of discretion is assignable as error.”

Spokane Ry. Co. vs. United States, 72 Fed. (2d) 443.

This was also a case that went up from Idaho and in the opinion this court cites

Mattox vs. U. S. 146 U. S. 140, 36 L. Ed. 917.

The United States Supreme Court has had this matter under consideration in a number of cases and has announced substantially the same rule as announced by this court in the last two quoted cases, and, of course, the rule announced by the United States Supreme Court is binding upon this court, and we quote the rule as laid down by the Supreme Court and which is supported by a long list of authorities:

“The rule that this court will not review the action of a federal trial court in granting or denying a motion for a new trial for error of fact has been settled by a long and unbroken line of decisions; and has been frequently applied where the ground of the motion was that the damages awarded by the jury were excessive or were inadequate. The rule precludes likewise a review of such action by a circuit court of appeals.

Fairmount Glass Works vs. Cub Fork Coal Co. et al, 287 U. S. 474, 488. 77 L. Ed. 439.

We submit from the above authorities that since there is substantial evidence in the record to support the judgment of the trial court that the trial court's refusal to grant a new trial upon a question of fact and other questions raised, is not reviewable by this court.

In conclusion we most earnestly submit that upon the entire record in this case there is competent, material, and substantial evidence to amply support each and every finding made by the trial court and competent, material, and ample testimony to support the findings of fact, conclusions of law and judgment that were made and entered by the trial court in this case. And that the judgment made and entered in this case by the trial court should be by this Honorable Court in all things affirmed, for which the foregoing is respectfully submitted.

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IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

UNION PACIFIC RAILROAD COMPANY,
a corporation,

Appellant,

vs.

ALBERT G. STANGER AND PHYLLIS STANGER,
Appellees.

APPELLANT'S REPLY BRIEF

Appeal from the District Court of the United States for the
District of Idaho, Eastern
Division..

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In the appellees' brief some material facts appear to have been overlooked, first, in the statement of facts, and secondly, in the argument predicated upon the assumed facts, and some propositions of law have been advanced to which we believe a response helpful to this court can be made without too exhaustive a discussion; consequently we are filing this brief in reply.

What purports to be a complete summary of appellant's testimony appears at pages 16 to 22 inclusive of the appellees' brief. There is omitted from this statement however any reference to the testimony of L. R. Nichols, a mechanical foreman of thirty-three years experience employed by the defendant Railroad Company at LaSalle, Colorado (R.260), who

arrived at the scene of the accident within 15 or 20 minutes after its occurrence and located all of the parts of the broken wheel, which consisted of five pieces, which he collected up and packed and shipped to the Engineer of Tests of the Railroad Company at Omaha, and when asked to state whether or not the breaks on these parts were new or old breaks his answer was that they were all new breaks (R. 263-264). Upon cross-examination he stated that they constituted the complete rim of the wheel and that the plate and hub were on the axle, that the wheel was all there and the parts fit together (R.264). This witness had no interest in the matter and was not impeached in the slightest degree. His testimony did not assume to be expert, did not consist of conclusions but consisted of plain statements of fact by an experienced mechanical foreman. His testimony links with that of Mr. Pflasterer, which was not merely the hypothetical testimony of an expert but which embraced reliable and undisputed testimony of the physical facts which he observed upon making a laboratory examination of the wheel, to the effect that the breaks were bright and shiny and all new breaks (R.289); the rupture or break was "from the inside face, the flange side, outward. The edge at the outside is serrated irregular. It is no trick to trace it," and there was no way to find the breaks without cutting the wheel up (R.288). Plaintiffs' counsel objected to the question upon the ground that it called for a pure conclusion of the witness to which the court responded: "He expressed his opinion from his personal knowledge. Overruled." (R.288). The witness' testimony therefore was offered and received by the court as testimony of facts. It is true that he testified also as an expert, but that he testified as to pertinent

facts, which stand undisputed and unimpeached, and that this is corroborated by and coincides with pertinent facts testified to by Mr. Nichols appears to have been overlooked by the appellees in the discussion of the defendant's testimony and the citation of authorities dealing with the question of *res ipsa loquitur* and the meeting of the *prima facie* case.

We will respond to the argument in the order of its presentation in the brief.

I.

Under this point at pages 23 and 24 of the appellees brief some authorities are cited on the rules of review of findings and conclusions of the lower court. Since this court is continuously so conversant with anything that may be cited on this point we are content to say that we accept the appellees postulate that "Findings will not be disturbed on appeal if they are supported by sufficient evidence." Conversely it is equally true that unless the findings of fact are supported by the evidence and the conclusions are warranted from the findings that can properly be made the judgment will be reversed. This court has said it is in as good a position as the trial court was to appraise the evidence and that it has the burden of doing that. Our contention is that the evidence was undisputed (1) with reference to the cause of the derailment, which was a fresh break of a wheel, which break could not have previously been discovered except by cutting the metal, and (2) that upon the undisputed record Mrs. Stanger was afflicted with a well established chronic ailment for the cure of which the operation was performed and that damages have been erroneously assessed therefor against the Railroad Company.

II.

Res Ipsa Loquitur

This subject is discussed at pages 25 to 32, inclusive, of the appellees brief.

When the language of these decisions, which consist chiefly of California decisions and citations from California Jurisprudence, is analyzed there does not appear to be much upon which to further take issue. They appear to proceed upon the assumption, implied if not expressed, that where the derailment of a passenger train has been shown to have resulted from a mechanical failure which suddenly occurred and which could not have been discovered by prior inspection the presumption may be weighed in the scales of evidence as against the defendant's evidence. The California rule at once becomes irrelevant because the California decisions giving presumptions the weight of evidence opposed to other evidence are based upon Sections 1957 and 1963 California Code of Civil Procedure as interpreted by the California Supreme Court.

Monterey County vs. Donnolly, 83 Cal. 507, 510;

People vs. Milner, 122 Cal. 197;

Ariasi vs. Orient Insurance Co., 50 Fed. (2d) 548, 552.

The oversight of this distinction is carried into the appellees brief at page 27, where the text of a California decision is italicised for emphasis, by applying the test of "whether or not the explanation was sufficient to balance or overcome the inference raised under the doctrine of *res ipsa loquitur*." The

word inference as above used is synonymous with the word presumption. Preceding in the text it is stated that under the doctrine of *res ipsa loquitur* the defendant must explain "in some degree." Accepting that as the true expression of the rule and rejecting the further test in that opinion based upon a statute permitting the presumption claimed by the rule to weigh in the scale of evidence the decision will be in harmony with the decisions at large (Wigmore Evidence, 2d Ed. Sec. 2491; 95 A. L. R. 880).

Also at page 27 of the brief an Arizona decision is quoted from, but it will be observed that that decision deals with "facts proven" to be weighed against the evidence of the carrier. The force of that decision, if indeed it has any force opposed to the contention of the appellant, is fully overcome and so admirably stated in a recent decision of the Arizona Supreme Court, *Seiler vs. Whiting*, 84 Pac. (2d) 452, 454-455, that we quote from it as follows:

"We consider next the question of presumptions. There has been much erroneous thinking and more loose language in regard to presumptions. We read of presumptions of law and presumptions of fact, of conclusive presumptions and disputable presumptions. In truth there is but one type of presumption in the strict legal meaning of the word, and that is merely a general rule of law that under some circumstances, *in the absence of any evidence to the contrary*, a jury is compelled to reach a certain conclusion of fact. But a presumption so declared by the law is only raised by the absence of any real evidence as to the existence of the ultimate fact in question. It is not in and of itself evidence, but merely an arbitrary rule imposed by the law, to be applied in the absence of evidence, and whenever evidence contradicting the presumption is

offered the latter disappears entirely, and the triers of fact are bound to follow the usual rules of evidence in reaching their ultimate conclusion of fact. As was once said, 'Presumptions may be looked on as the bats of the law, flitting in the twilight, but disappearing in the sunshine of actual facts.' *Mockowik vs. Kansas City, etc. R. Co.*, 196 Mo. 550, 94 S. W. 256, 262. The Supreme Court of South Dakota, in *Peters vs. Lohr*, 24 S. D. 605, 124 N. W. 853, in discussing the question, used the following language (page 855):
 '* * * A presumption is not evidence of anything, and only relates to a rule of law as to which party shall first go forward and produce evidence sustaining a matter in issue. A presumption will serve as and in the place of evidence in favor of one party or the other until prima facie evidence has been adduced by the opposite party; but the presumption should never be placed in the scale to be weighed as evidence. The presumption, when the opposite party has produced prima facie evidence, has spent its force and served its purpose, and the party then, in whose favor the presumption operated, must meet his opponents prima facie evidence with evidence, and not presumptions. A presumption is not evidence of a fact, but purely a conclusion. *Elliott Ev. Secs. 91, 92, 93; Wigmore, Ev. Secs. 2490, 2491.** * *"

Before concluding our discussion of this subject by a citation of the authorities binding upon this court we will make brief reference to other authorities cited by the appellees in the discussion of this point.

At page 29 of the brief appellees cite *T. & P. R. Co., vs. Carlin*, 189 U. S. 354 as authority for the proposition that a jury is not bound to believe an explanation. The briefest examination of that decision will disclose to an informed mind that it has no relevancy or weight in the present discussion.

That decision related to a negligence action decided on disputed testimony and not to a case where an unsupported presumption was pitted against undisputed evidence.

“Presumptions are indulged to supply the place of facts; they are never allowed against ascertained and established facts. When these appear presumptions disappear.”

Lincoln vs. French, 105 U. S. 614.

The annotation to 95 A. L. R. 869, beginning at 878, and particularly at page 880, cites the decisions of the federal courts and of most state courts as supporting this statement of the law. The same result was arrived at by this court with the copious citation of authorities in *Ariasi vs. Orient Insurance Company*, 50 Fed. (2d) 548, particularly discussed at pages 552 and 553.

This court is equally familiar with the decision of the United States Supreme Court in *New York Life Insurance Company vs. Gamer*, 303 U. S. 161, 114 A. L. R. 1218, decided on appeal (certiorari) from this court, in which the United States Supreme Court held:

“The presumption that a violent death was accidental rather than suicidal is not evidence and may not be given weight as evidence.”

At page 171 of 303 U. S. the court said:

“The evidence being sufficient to sustain a finding that the death was not due to accident there was no foundation of fact for the application of the presumption; and the case stood for decision by the jury upon the evidence unaffected by the rule that from the fact of

violent death, there being nothing to show the contrary, accidental death will be presumed. The presumption is not evidence and may not be given weight as evidence," (citing authorities).

The reported case discloses that in the *Gamer* case, before the Supreme Court, the defendant in certiorari cited numerous California decisions, which were not accepted in arriving at the decision.

To rest a judgment, or affirmance, herein on the balancing of the presumption against the facts proven in the record would be to deny to the defendant due process of law.

Western & Atl. R. Co., vs. Henderson, 279 U. S. 639.

III.

The appellees' argument on this point is distinguishable at the outset because it proceeds upon the erroneous assumption that the plaintiffs' case was opposed only by the opinion of an expert, and ignores the undisputed *facts* testified to by such expert, and undisputed *facts* testified to by the witnesses Nichols and Schroeder.

The decision in *Erie Railroad Company vs. Tompkins*, and the two Idaho cases cited at page 32 of the appellees brief do not affect the question.

Erie Railroad Company vs. Tompkins merely held that the federal courts are bound to follow the decisions of the state courts on matters of substantive law, it did not deal either with the admissibility of evidence or the weight to be given to evidence which had been admitted.

Extended discussion or analysis of the two Idaho cases cited at page 32 of appellees' brief is unnecessary because if they possessed any controlling force either under rules of law applicable to this case or otherwise they must yield to the more recent decision of the Idaho Supreme Court in *Stroschein vs. Shay, et al.*, 120 Pac. (2d) 267, where at pages 271-272 the court said:

"Appellant contends that the testimony of Dr. Peacock that appellant was able to return to his normal work on or before May 20, 1941, and that he had no permanent disability, being the testimony of an expert medical witness, is purely advisory, therefore not sufficient to support the Board's finding No. 6. In support of such contention, appellant cites and relies upon *Nistad vs. Winton Lbr. Co.*, 61 Idaho 1, 99 P. 2d 52, reported in 59 Idaho 533, 85 P. 2d 236; also he cites *Evans vs. Cavanagh*, 58 Idaho 324, 73 P. 2d 83; *Suren vs. Sunshine Min. Co.*, 58 Idaho 101, 108, 70 P. 2d 399, 403. * * *

"There is no distinction between expert testimony and evidence of other character as regards the weight to be given it in a particular case. *Treadwell vs. Nickel*, 194 Cal. 243, 228 P. 25; *Rolland vs. Porterfield*, 183 Cal. 466, 191 P. 913. In *Langford vs. Jones*, 18 Or. 307, 22 P. 1064, it was held that opinions of experts on questions of medical science, though based upon hypothetical statements, are entitled to the same consideration as other direct oral testimony, when such statements are found to be real."

Appellant's evidence is conclusive, creditable, and was binding upon the trial court.

Appellees in their brief take no exceptions to the cases cited by the appellant and, of course, could not refute the

uncontradicted testimony of appellant's witnesses in rebutting the allegations of negligence charged in their complaint, which alleged that the appellant was guilty of negligence by reason of defective equipment, road bed and tracks (R.3). Full explanation was made by appellant's witnesses with respect to each of the various alleged grounds of negligence; and there was no occasion to make any other explanations.

The appellees, while not disputing defendant's uncontradicted evidence or the effect of it, merely suggest that the witness Claude R. Pflasterer was an expert and interested witness and for that reason his testimony under the law be disregarded by the trial court.

Pflasterer's testimony, as we have heretofore shown, was primarily strictly factual, and corroborated by the factual testimony of an experienced mechanical foreman, and his final testimony on the point was not based upon any supposition or hypothesis but upon a definite and careful examination and test of the wheel which demonstrated the actual cause of the break, and neither the physical facts nor the scientific opinion are disputed. The testimony shows by the evidence of the witnesses Schroeder, Nichols and Pflasterer that all of the broken parts of the wheel were new, fresh and clean breaks (R. 263, 267, 289). All parts of the broken wheel were located, picked up, packed and shipped to Dr. Barr at Omaha (R.263-264), and all of the broken parts fit the part of the plate left on the axle (R.264). These parts when received by Dr. Barr at Omaha were subjected to a metallurgical test by the witness Pflasterer to determine what caused it to break (R.277), who

found, not by any guess or speculation, that the wheel broke due to internal stresses (R.286), and that these stresses which caused the wheel to break could not be discovered by any kind of inspection and could not be found "without cutting the wheel up" (R.28²⁸⁸). Thousands of wheels of this same type are used by railroads all over the country, made by the same mill and the same specification (R.289-290). All railroads purchase wheels under the A. R. A. (American Railway Association) specifications (R.286-287), and this wheel met the specifications (R.294-296). Since 1912 there have been but two wheels break from such causes (R. 289-290).

This analysis will demonstrate that Pflasterer's testimony was based upon an actual observation of the broken parts, supported by the testimony of Schroeder and Nichols, and the actual test of the metal which he made, which, as described by him, definitely shows that when he sawed through the wheel it bound the tool and it was necessary to put in a wedge and continue through the wheel (R.286) definitely establishing the stress in the wheel and that there is no other way "to find them without cutting the wheel up" (R.288). There is therefore very little opinion, if any, expressed in his testimony, but if there be any it is blended into actual facts.

What caused this wheel to break was also a subject of expert testimony,

20 Am. Juris. 682,

and we think that without defendant's testimony, and that of Pflasterer, the court could not say from common knowledge or otherwise what caused the wheel to break. He was a skilled

witness in the line of work that he was doing and in the test that he made of the wheel and had the right to express an opinion, which when done was binding upon the court.

20 Am. Juris. 1061.

Counsel at page 34 of their brief cite the case of *Brandes vs. Rucker-Fuller Desk Co.*, 282 Pac. 1009, in support of the theory that the court was not bound to accept Pflasterer's testimony. Appellees indicate that this is a Colorado case, however that is not correct, it is a California case, and is readily distinguishable because the testimony there showed that after the steering shaft broke the driver was guilty of negligence in not bringing the vehicle under control, and a reading of the decision shows that the question of expert testimony was probably merely incidentally mentioned by the court and the judgment was reaffirmed upon the negligence of operating the vehicle. However, notwithstanding the statement of the court in that case the California court in other decisions has since distinguished that rule by one which says:

“* * * when the matter in issue is one within the knowledge of experts only, and is not within the common knowledge of laymen, the expert evidence is conclusive.”

Nichols vs. Jacobson (Cal.) 298 Pac. 505.

This was a case in which the doctrine of *res ipsa loquitur* applied and defendant's motion for nonsuit which was granted by the trial court was sustained.

In *William Simpson Construction Co. vs. Industrial Acci-*

dent Commission (Cal.) 240 Pac. 58, the court annulled an award of the Industrial Accident Board because the expert witness who testified were not disputed and the matter was a subject of skilled or expert testimony. The court laid down the rule that the question being one for experts it could only be established by such testimony and, after citing cases, the court said:

“The rule to be drawn from these decisions, as we understand them, appears to be that whenever the subject under consideration is one within the knowledge of experts only, and is not within the common knowledge of laymen, the expert evidence is conclusive upon the question in issue. It follows that in such cases neither the court nor the jury can disregard such evidence of experts, but, on the other hand, they are bound by such evidence, even if it is contradicted by nonexpert witnesses. The same rule would, of course, apply to a proceeding before the Industrial Accident Commission. Under this rule, the Commission, in the present proceeding, could not reject the evidence of the medical experts when testifying upon any subject peculiarly within their own knowledge. The same rule would apply as to opinions of the medical experts upon a subject solely within their professional knowledge, and not within the knowledge of the ordinary individual.”

To the same effect see *Pearson vs. Crabtree*, (Cal.) 232 Pac. 715, where the court held that an instruction which was refused by the court correctly stated the law and another instruction which the court gave did not correctly state the law constituted prejudicial error. The prejudicial instruction was one which told the jury that they might disregard the opinions of experts. This testimony related to x-ray pictures, which the court held to be knowledge not possessed by the ordinary

layman and that the jury was bound to accept such testimony.

In *Hutchinson vs. Miller and Lux*, (Cal.) 212 Pac. 394, the court held that the jury could not disregard the expert opinion evidence of the only witness who testified concerning the speed of the driver's motorcar or the power and adjustment of his lights.

See also *Hines vs. Industrial Accident Commission*, by the Supreme Court of California, 8 Pac. (2d) 1021.

Another state case directly in point is that of *Harris vs. Nashville C. & St. L. Ry.* (Ala.) 44 So. 962, 14 L. R. A. N. S. 261. In this case it is interesting to note the statement of the annotator at the bottom of page 262 of 14 L.R.A.N.S., where he says that it was a common belief that the act of reversing an engine is more effective in causing it to stop than to apply the air brakes, which he concluded was an erroneous belief and says:

“One entertaining such convictions is likely to agree with the majority of the court in the Harris Case where it suggests that the testimony of the engineer may be considered as the statement of a positive fact based on tests and experience, rather than as an opinion. Certainly he would not deny that the question is one of scientific, rather than of common, knowledge.”

Such we think is a correct statement of the effect of the witness Pflasterer's testimony in the case at bar; and in the Harris case the court said:

“If the engineer did all things known to skillful engineers to stop the train, the defendant was not

guilty of negligence in this respect; and, in the absence of any evidence to the contrary, the affirmative charge should have been given for the defendant. If it is not true that what he did was the quickest way to stop the train, the plaintiff should be able to get some evidence to the contrary, and not have to rely upon the common knowledge of courts to establish an inference contrary to the unanimous verdict of men skilled in the science of operating trains. If such evidence is not obtainable, that fact alone would confirm the expert testimony heretofore given on this subject. In the absence of some proof to the contrary, the expert evidence should not be questioned by the common knowledge of courts and juries."

Appellees also cite as authority the case of Dayton Power & Light Co., vs. Public Utilities Commission, 292 U. S. 290, 54 S. Ct., 647, 78 L. Ed. 1267, but that case is definitely distinguishable because the expert testimony had to yield to the value of the leases dependent upon the capacity of the lands to yield productive wells and that any statement concerning that could not be changed until tested by experience.

However, the United States Supreme Court has recognized the same rule as the California and Alabama courts referred to above in the case of International Shoe Co., vs. Federal Trade Commission, 280 U. S. 291, 74 L. Ed. 431, where on page 299 of 280 U. S. the court said:

"the existence of competition is a fact disclosed by observation rather than by the processes of logic; and when these officers, skilled in the business which they have carried on, assert that there was no real competition in respect of the particular product, their testimony is to be weighed like that in respect of other matters of fact. *And since there is no testimony to the*

contrary and no reason appears for doubting the accuracy of observation or credibility of the witnesses, their statements should be accepted." (Italics ours)

In *McCardle vs. Indianapolis Water Co.*, 272 U. S. 400, 71 L. Ed. 316, the court said:

"The testimony of a competent valuation engineer who examined the property and made estimates in respect to its condition is to be preferred to mere calculations based on averages and assumed probabilities.

See also *Bene vs. Jeantet*, 129 U. S. 683, 32 L. Ed. 803.

In *Watjen vs. Louisville Tobacco Warehouse Company*, (6th Cir.) 29 Fed. (2d) 801, the court reversed a judgment for the plaintiffs because of the uncontradicted testimony of three experienced tobacco men who testified for the defendant concerning values, "neither their competency nor integrity was attacked," and there was no independent countervailing testimony and the decision of the court is reflected in the syllabus, which is as follows:

"In buyer's action for seller's breach by delivering inferior tobacco, where experienced tobacco men testified to the difference in value after careful comparison of samples, and there was no independent countervailing testimony, and samples of all the tobacco were not exhibited to the jury, the court should have charged that the damages were beyond dispute in event of recovery, instead of leaving the damages to the jury's discretion."

In *Elkins vs. Commissioner of Internal Revenue*, (3rd Cir.) 91 Fed. (2d) 534, the court said:

"Petitioner introduced an expert witness familiar with the income tax law of the United Kingdom, who testified that under British law the shareholder is regarded as a taxpayer in respect to the amounts deducted from the dividends for income taxes 'appropriate' thereto. This proof was not contradicted, and, like the proof of any other question of fact, should not be arbitrarily disregarded."

In *Diamond Alkali Co., vs. Heiner*, 60 Fed. (2d) 505, the judgment of the trial court was modified and in discussing the position taken by the trial judge concerning expert testimony the court said:

"It is apparent that he ignored the testimony of skilled and experienced witnesses, *based upon actual facts*, and reached a conclusion contrary to their testimony, without any substantial evidence to sustain his conclusion." (Italics ours).

Before a trial court can ignore the expert testimony in a case, particularly of the nature of the testimony in the case at bar, there must be some other evidence in the record on which to base such a departure from the testimony, and in the absence of such testimony there is nothing which can be said to dispute such expert evidence.

The B. F. Guinan, 40 Fed. (2d) 277.

To the same effect see: *Ewing vs. Goode*, (6th Cir.) 78 Fed. 442, 444.

"There is no room for the exercise of common knowledge as against the uncontradicted testimony of an expert. Similarly, the view is stated that the testimony of experts becomes more than mere opinion

where it consists of facts revealed by the use of technical instruments and where it is scientifically established to the degree of actual demonstration."

20 Am. Juris. 1061, Sec. 1208.

See also: J. T. Morgan Lumber Co., vs. Williams, (Ky.) 136 S. W. 131;

Jensen vs. Wisc. Cent. RR Co., (Wisc.) 128 N.W. 982;

Kerwin vs. Friedman (Mo.) 105 S. W. 1102.

Finally we think the correct rule of law is announced by the United States Supreme Court in the case of Kansas City S. R. Co., vs. C. H. Albers Commission Co., 223 U. S. 573, 56 L. Ed. 566, 567, where the court said:

"The uncontradicted testimony of witnesses likely to be informed on the subject disclosed the existence of an applicable lawful rate on the northern line from Omaha to Kansas City. True, this testimony was not the best evidence, but, being offered and admitted without objection, it was evidence which could not be disregarded."

Accordingly the authorities cited by the appellant in its original brief at pages 21 to 39, inclusive, are conclusive of the matter.

IV.

Under this heading it is asserted by appellees that the law undoubtedly is that whoever manufactures the equipment of a common carrier of passengers is regarded as the agent of the

common carrier and the fact that it was manufactured in an independent establishment makes no difference and the negligence of such manufacturer is chargeable to the common carrier, or differently stated, the purchase of defective machinery from another is no defense. This seems to us a rather brash statement in view of the readily determinable condition of the law and the further fact that the appellees have cited cases from but three American jurisdictions to support the assertion, to-wit: from California, New York and Kentucky.

The case of *Morgan vs. Chesapeake & Ohio Ry. Co.*, cited at page 42 of appellees' brief is, as the citation shows, reported in 15 L.R.A.N.S. 790. There is quite an extensive footnote to this case and the first paragraph of that footnote states that the rule asserted by appellees at page 35 of their brief has never been recognized as the true doctrine outside of New York, except in California and Kentucky. The first paragraph of the footnote to this case is as follows:

"The court, in *Morgan vs. Ches. & O. R. Co.*, bases its position that the carrier is chargeable with the failure of the manufacturer to exercise the utmost human skill and foresight, upon the case of *Hegeman vs. Western R. Corp.*, 13 NY 9, 64 Am. Dec. 517, which however, has never been recognized as the true doctrine outside of New York, except in California; the recognized rule of liability of a carrier of passengers for injuries sustained in consequence of latent defect in its cars being that there is no liability if such defect could not have been discovered by the exercise of that high degree of care incumbent upon the carrier itself and by the application of the well recognized and usual test for defects."

Since the appellees have cited cases from those courts only

we assume that the foregoing statement of the annotator will not be challenged. These decisions being against the considered weight of authority and the principle announced by the appellees disproved as a general proposition of law we assume that further discussion of this point will not be necessary.

It might be said, however, that the New York case of *Hege-man vs. Western R. Co.*, 616 Barb 353, cited at page 41 of appellees' brief qualified its ruling merely to a holding that the carrier might be held liable if the defect could be ascertained by a known test. The same expression will be found in the Kentucky case of *Morgan vs. C. & O. Ry Co.*, 105 S. W. 961.

We think the record on this point supports no other conclusion than that the only known test which would have revealed the condition from which the failure of the wheel proceeded was to saw it, as testified by Mr. Pflasterer (R.288-289), but be this as it may for the purpose of this point, the courts at large throughout the United States have uniformly refused to commit themselves to the principle of law for which the appellees contend, for the virtual effect of it would be to make the carrier an insurer.

V.

The Fibrosis Uterus and the Operation

Under this subject, discussed at pages 42 to 46 inclusive of the appellees brief, it is first suggested that because Mrs. Stanger testified that she "was in substantially perfect health and had been for several months prior to the accident * * *, and was in better condition than she had been for a long time, and had been in perfectly normal health" (quoting from the

brief) , this testimony should be accepted in face of her medical history, the undisputed testimony of the physicians and the pathologist. Also the statement in the brief above quoted constitutes an exceedingly free translation of such testimony as she did give. What she actually stated was that her physical condition for three months previously had been perfect, that for about three months before she had been to a doctor and that he checked her up and she had been in perfectly normal health. Obviously she could not be the judge of whether she was in perfect normal health so far as concerns the question of her having a fibrosis uterus, the result of childbirth infection and consisting of an ailment which develops over a considerable period of time and which under the facts in this case must have been developing for close to a year. Her statement that she had been to a doctor for about three months before and he checked her up and she had been in perfect normal health for three months, in view of Dr. Woolley's undisputed testimony that she had gone to him November 10, 1939 (R.216) , two months previous to the accident, who treated her for an ailment which under the medical testimony could have proceeded only from the fibrosis uterus, her last visit to Dr. Woolley being December 14, 1939 (R.220) , approximately one month prior to the time of the derailment, certainly can not serve as a basis of assumption in determining the question before the court. Furthermore, where is there evidence in the record that will support a finding that Phyllis Stanger will continue to suffer nervously and/or physically in consequence of the derailment so long as she may live? (Error V.)

At page 46 of the brief the appellees quote an instruction embraced in a decision of the Idaho Supreme Court, *Jones vs.*

Caldwell, 116 Pac. 110, cited by this court in Union Oil Company vs. Hunt, 111 Fed. (2d) 269, at page 270. It is clear upon reading the rule announced in the Hunt case at page 277 that the Jones case was cited on another point, viz., that where the evidence establishes that the plaintiff was suffering from a chronic disorder at the time of the accident recovery must not embrace damages to compensate for the disorder existing at the time but must be limited to those chargeable in reason to the defendant. The following facts of the Jones case distinguish it from the case at bar:

“Dr. Stewart testified that the plaintiff might have been suffering from a *latent* infection, which, however, would be likely *never to break into activity or cause any discomfort or illness or pain* except for a violent fall or similar accident. If that be true, in this case the proximate cause of the pain, discomfort, and suffering from such latent disease would be the fall, and not the latent condition.” (page 113)

Under the issue of the case in the Jones suit there is no conflict between the rules of law announced by this court in the Union Oil case and that cited by the appellees.

“Where medical witnesses in an action for personal injuries disagree in opinion and theory, the undisputed history of the case is often the most satisfactory and controlling fact.”

Sorenson vs. Northern Pac. Ry. Co., 36 Fed. 166.

See also: United States vs. Lumbra, 63 Fed. (2d) 796, 797-798.

Evidence that is consistent with an hypothesis that one contracted tuberculosis as a result of the accident

and also with an hypothesis that he did not tends to establish neither.

Eggen vs. U. S. 58 Fed. (2d) 616, 620;

Gunning vs. Cooley, 281 U. S. 90, 74 L. Ed. 720.

The hospital record, a pertinent portion of which we have quoted at page 43 of our original brief, is not and cannot be disputed. It is eloquent not only for what it states but for what it does not state. What it does state and what was found by the pathologist and physicians after the operation are wholly irreconcilable with the appellees theory based upon the testimony of Mrs. Stanger. Again we remark that the pertinent thing that this hospital chart does not show is any record in the history of the case (and that appearing at page 43 of our brief is "case history") of her having been in any train derailment or railroad accident. We have no other concern on this point than that the court shall carefully read and verify by reference to the record those portions of the testimony cited at pages 41 to 43 and 47 to 51, inclusive, of our original brief. If this shall be done, which we are certain will be the case, we are confident that this court will without hesitation set aside the judgment rendered herein.

VI.

The authorities cited by the appellees under this point deal with assigned error in asserting excessive damages for ascertained injuries. The authorities so cited are not very helpful because in the present case damages have been awarded for

a condition ascertained to have been chronic and active except for temporary palliation and temporary relief.

VII.

Under this heading counsel cite authorities to the effect that the court will not reverse the trial court for refusal to grant a new trial and that a motion for new trial is not subject to review. It is unnecessary for us to debate this proposition because the appeal and the points urged herein are based upon the matters preceding the motion for new trial and, of course, the fact that the motion for new trial was denied does not in any way prevent or militate against the consideration of these questions.

That the judgment should be reversed is,

Respectfully submitted,

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No. 10149

United States ↓
Circuit Court of Appeals
For the Ninth Circuit.

STANLEY LABORATORIES, INC., and ED-
WARD A. BACHMAN, an individual trading
as STANLEY LABORATORIES and as
STILLMAN PRODUCTS COMPANY,

Petitioners,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

Transcript of the Record

UPON PETITION TO REVIEW AN ORDER OF THE
FEDERAL TRADE COMMISSION

FILED

APR 29 1943

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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United States of America
Before Federal Trade Commission

Docket No. 4130

In the Matter of

STANLEY LABORATORIES, INC.,
a corporation, and

EDWARD A. BACHMAN, an individual
trading as

STILLMAN PRODUCTS COMPANY and as
STANLEY LABORATORIES.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission having reason to believe that Stanley Laboratories, Inc., a corporation, and Edward A. Bachman, an individual trading as Stillman Products Company and as Stanley Laboratories, hereinafter referred to as respondents, have violated the provisions of the said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

Paragraph One: Respondent, Stanley Laboratories, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Oregon, with its principal place of

business located in Portland, Oregon. Respondent Edward A. Bachman is an individual, trading as Stillman Products Company and as Stanley Laboratories, who also has his office and principal place of business in Portland, Oregon, in connection with and located at the same address as the corporate respondent above named. The respondent Edward A. Bachman is also president of the corporate respondent Stanley Laboratories, Inc., and controls and directs the business activities, sales policies and practices of the corporate respondent.

Paragraph Two: Respondents are now, and for more than one year last past have been, engaged in the business of selling and distributing certain drug products for feminine hygiene.

Respondents designate their said products so sold and distributed as "M. D. Medicated Douche Powder," "Contra-Jel," "Femeze," and "M. D. Supercones."

Respondents cause said products, when sold, to be transported from their place of business in Oregon to the purchasers thereof located in various other States of the United States and in the District of Columbia.

Respondents maintain, and at all times mentioned herein have maintained, a course of trade in said products in commerce between and among the various States of the United States and in the District of Columbia.

Paragraph Three: In the course and conduct of their aforesaid business, the respondents have

disseminated and are now disseminating, and have caused and are now causing the dissemination of false advertisements concerning their said products, by the United States mails and by various other means in commerce, as commerce is defined in the Federal Trade Commission Act, for the purpose of inducing, and which are likely to induce, directly or indirectly, the purchase of said products; and respondents have also disseminated and are now disseminating, and have caused and are now causing the dissemination of false advertisements concerning their said products, by various means, for the purpose of inducing, and which are likely to induce, directly or indirectly, the purchase of their said products in commerce, as commerce is defined in the Federal Trade Commission Act. Among and typical of the false, misleading and deceptive statements and representations contained in said false advertisements disseminated and caused to be disseminated as hereinabove set forth by the United States mails, by advertisements in newspapers, and by circulars, leaflets, folders, pamphlets and other advertising literature, are the following:

1. As To M. D. Medicated Douche Powder:

“A Valuable Prescription For Discriminating Women . . . produced for discriminating modern women who desire a sanitary, and dependable douche to insure their personal hygiene. It is but recently that scientific research has developed new and improved methods to safeguard the health and happiness of married women. Endorsed by physicians and surgeons.

M. D. Medicated Douche Powder not only cleans the vagina, and soothes the delicate membrane tissue, but it has the added advantage of the protective action of oxyquinolin sulphate, a dependable safeguard. Because of its many other beneficial uses, 'M. D.' is also a very valuable household remedy . . . for cuts, sores and burns."

"M. D. Medicated Douche Powder, endorsed by leading physicians and surgeons, is a germicide—soothing and cooling to delicate membranes with the addition of oxyquinolin sulphate—a reliable safeguard."

"Medical science now answers the problems of millions of women with a truly effective, reliable antiseptic powder."

"Effective in combatting any form of bacteria."

"It relieves women of fatigue and the annoying discharge, often occasioned by all day standing."

"Manufactured by Stanley Laboratories."

2. As To Contra-Jel:

"Contra-Jel is the highest quality vaginal antiseptic in jelly form. Its consistency insures even distribution and prolonged contact with every part of the vaginal tract, and its protective action endures as long as it remains within the vagina . . . "

"Contra-Jel is a harmless, non-irritating, vaginal antiseptic and prophylactic . . . It is

more convenient, sanitary and effective than are douches, tablets, capsules, or suppositories.”

3. As to M. D. Supercones:

“They are stable and do not lose their antiseptic strength . . . a powerful yet non-irritating antiseptic . . . M. D. Supercones remain in effective antiseptic contact for many hours . . . They are actually soothing and beneficial as well as antiseptic.”

4. As To Femeze:

“Femeze has been found to be a simple effective prescription affording relief for the functional pains and cramps which accompany menstruation . . . bringing relief in a short time by relaxing the contracted womb muscles, allowing them to react in a natural way. It does not merely deaden your nerves with drugs or narcotics to stop the pain. Femeze contains no narcotics.”

Paragraph Four: Through the use of the aforesaid statements and representations and others of similar import and meaning not specifically set out herein, the respondents represent directly and by implication:

1. That M. D. Medicated Douche Powder is a recent development of scientific research which is endorsed by leading physicians and surgeons; that said preparation is a competent and effective contraceptive; that said preparation is an antiseptic and germicide which will

combat any form of bacteria; that such preparation has competent remedial qualities for use on cuts, sores and burns, and that said preparation will relieve fatigue and annoying discharge connected with the menstrual period.

2. That Contra-Jel gives immunity from pregnancy, protection from venereal disease, and has germicidal and antiseptic properties.

3. That M. D. Supercones constitute an effective contraceptive which has powerful antiseptic properties.

4. That Femeze is an effective treatment for functional pains and cramps which accompany menstruation and that said preparation will relax the womb muscles, allowing them to react in a natural way.

Paragraph Five: In truth and in fact none of said products distributed by the respondents constitute competent or effective contraceptives and will not give immunity from pregnancy. None of said products constitute an adequate prophylactic and will not give protection from venereal diseases.

The product M. D. Medicated Douche Powder is not a recent development of scientific research and is not endorsed by leading physicians or surgeons. Under the conditions of use recommended by the respondents this product is not a germicide and is not a reliable antiseptic effective in combatting any form of bacteria. This preparation would have very little therapeutic value in the treatment of cuts, sores and burns generally. Such preparation has no

therapeutic value in relieving fatigue or discharge connected with the menstrual period.

Respondents' preparation Femeze is not an effective treatment for functional pains and cramps in excess of possible lessening of sensitivity to pain which might accompany menstruation. There is no scientific basis for the representation that this preparation will relieve menstrual pain by relaxing the womb muscles and allowing them to react in a natural way, and respondents' said preparation will not accomplish such results.

Respondents' preparations, Contra-Jel and M. D. Supercones do not have germicidal properties nor do they constitute powerful antiseptics as the antiseptic properties of these preparations are comparatively mild.

Paragraph Six: In addition to the statements and representations hereinabove set forth, the respondents make false, deceptive and misleading representations to the effect that their products are either prescribed or compounded by physicians or that they bear the endorsement or recommendation of the medical profession by means of the use of the letters "M. D." in designating their products M. D. Medicated Douche Powder and M. D. Supercones and by including therewith in advertising the likenesses of nurses and doctors with the figure of a cross in simulation of the Red Cross emblem.

In truth and in fact said products are not prescribed or compounded by a physician or physicians and they have not received the endorsement or recommendation of the medical profession.

Paragraph Seven: In addition to the above representations, the respondents, by the use of the term "laboratories" in their corporate and trade names, and in their advertising literature, also represent that they own, operate and control a laboratory equipped for the compounding of medicinal preparations and for research in connection therewith. In truth and in fact the respondents neither own nor control any factory, plant or laboratory wherein their medicinal preparations are compounded or wherein any research activities are conducted, but instead the respondents are merely distributors of products compounded and manufactured by other concerns.

Paragraph Eight: The use by the respondents of the foregoing false, deceptive and misleading statements, representations and advertisements disseminated as aforesaid has had, and now has, the capacity and tendency to, and does, mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such false statements, representations and advertisements are true, and causes a portion of the purchasing public, because of such erroneous and mistaken beliefs, to purchase respondents' said preparations.

Paragraph Nine: The aforesaid acts and practices of the respondents, as herein alleged, are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

Wherefore, The Premises Considered, the Federal Trade Commission on this 7th day of May, A. D. 1940, issues its complaint against said respondents.

NOTICE

Notice is hereby given you, Stanley Laboratories, Inc., a corporation, and Edward A. Bachman, an individual trading as Stillman Products Company and as Stanley Laboratories, respondents herein, that the 14th day of June, A. D., 1940, at 2 o'clock in the afternoon, is hereby fixed as the time, and the offices of the Federal Trade Commission in the city of Washington, D. C., as the place, when and where a hearing will be had on the charges set forth in this complaint, at which time and place you will have the right, under said Act, to appear and show cause why an order should not be entered by said Commission requiring you to cease and desist from the violations of the law charged in the complaint.

You are notified and required, on or before the twentieth day after service upon you of this complaint, to file with the Commission an answer to the complaint. If the answer is filed and if your appearance at the place and on the date above stated be not required, due notice to that effect will be given you. The Rules of Practice adopted by the Commission with respect to answers or failure to appear or answer (Rule VII) provide as follows:

In case of desire to contest the proceeding the respondent shall, within twenty (20) days

from the service of the complaint, file with the Commission an answer to the complaint. Such answer shall contain a concise statement of the facts which constitute the ground of defense. Respondent shall specifically admit or deny or explain each of the facts alleged in the complaint, unless respondent is without knowledge, in which case respondent shall so state.

* * *

Failure of the respondent to file answer within the time above provided and failure to appear at the time and place fixed for hearing shall be deemed to authorize the Commission, without further notice to respondent, to proceed in regular course on the charges set forth in the complaint.

If respondent desires to waive hearing on the allegations of fact set forth in the complaint, and not to contest the facts, the answer may consist of a statement that respondent admits all the material allegation of fact charged in the complaint to be true. Respondent by such answer shall be deemed to have waived a hearing on the allegations of fact set forth in said complaint and to have authorized the Commission, without further evidence, or other intervening procedure, to find such facts to be true, and if in the judgment of the Commission such facts admitted constitute a violation of law or laws as charged in the complaint, to make and serve findings as to the facts and an order to cease and desist from such violations. Upon

application in writing made contemporaneously with the filing of such answer, the respondent, in the discretion of the Commission, may be heard on brief, in oral argument, or both, solely on the question as to whether the facts so admitted constitute the violation or violations of law charged in the complaint.

In Witness Whereof, the Federal Trade Commission has caused this, its complaint, to be signed by its Secretary, and its official seal to be hereto affixed, at Washington, D. C., this 7th day of May, A. D., 1940.

By the Commission.

[Seal] OTIS B. JOHNSON,
Secretary.

[Title of Commission and Cause.]

ANSWER

Now comes the respondents in the above entitled cause and for answer to the complaint, state as follows:

1. Respondents admit the material allegations of fact in Paragraph One of the complaint, except that respondents say that Stanley Laboratories, Inc. is being dissolved as a corporation, that Edward A. Bachman has long since discontinued trading as Stillman Products Company and as Stanley Laboratories.

2. Respondents admit the material allegations

of fact in Paragraph Two of the complaint except that respondents say that they have long since discontinued the sale in interstate commerce of all of the products set forth in Paragraph Two except that product known as "M. D. Medicated Douche Powder".

3. Respondents admit the material allegations of fact in Paragraph Three of the complaint except that they say that respondents have long since discontinued the practice set forth in Paragraph Three of the complaint; and respondents say further that on January 31, 1940, they filed in this cause a stipulation executed on their behalf by James J. Hayden, their attorney, which stipulation is incorporated herein by reference and made a part of this answer.

4. Respondents admit the material allegations of fact in Paragraph Four of the complaint, except that these respondents incorporate herein by reference the said stipulation of January 31, 1940.

5. Respondents admit the material allegations of fact in Paragraph Five of the complaint, except that they incorporate herein by reference the said stipulation of January 31, 1940.

6. Respondents emphatically deny each and every allegation of fact in Paragraph Six of the complaint. They state further that these respondents have not made and do not make, false, deceptive or misleading representation to the effect that their products are either prescribed or compounded by physicians, or that they bear the endorsements or recommendation of the medical profession by use

of the letters "M. D." in designating products known as M. D. Medicated Douche Powder, M. D. Supercones, and/or by including therewith in advertising the likenesses of nurses and doctors with the figure of a cross in simulation of the Red Cross emblem. These respondents further state that they have long since discontinued the sale in interstate commerce of the product known as M. D. Supercones, and they incorporate herein by reference the said stipulation of January 31, 1940. These respondents say further that the formula for the product known as M. D. Medicated Douche Powder was in fact prepared by a reputable physician and the use of said product has been approved by reputable doctors, and has actually been prescribed by reputable doctors to their patients. These respondents further say that the use of the letters "MD" are not intended to mislead purchasers of M. D. Medicated Douche Powder, and do not, in fact, mislead purchasers of said product to believe the same has received the endorsement or recommendation of the medical profession generally. These respondents say further that they have in good faith secured a registered trade-mark in the United States Patent Office for the use of the letters, "M D" as a symbol of the product known as M. D. Medicated Douche Powder; and that said trade-mark is known as number 366203, issued by the United States Patent Office to Stanley Laboratories, Inc., under the Act of February 20, 1905. They say further that the use of likenesses of doctors in connection with the sale of said products has long

since been discontinued and reference is hereby made again to said stipulation; and further, that the use of said likenesses of doctors was not intended to simulate and does not, in fact, simulate the Red Cross emblem. They say further that the use in advertising of likenesses of nurses is not intended to simulate, and does not, in fact, simulate the Red Cross emblem, and that as a matter of fact the use in advertising of the likenesses of nurses is merely intended and does in fact serve merely as a device to call attention of the reader to the product advertised.

7. Respondents admit the material allegations of fact in Paragraph Seven of the complaint, except that they incorporate herein by reference said stipulation of January 31, 1940, and they say further that they do, in fact compound the product known as M. D. Medicated Douche Powder.

8. These respondents admit the material allegations of fact in Paragraph Eight of the complaint, except that they incorporate herein said stipulation of January 31, 1940, and except that with respect to the product known as M. D. Medicated Douche Powder, the use of the letters "MD" has not had, and does not now have the capacity of tending to mislead or deceive a substantial portion of the purchasing public in any respect.

9. These respondents admit the material allegations of fact in Paragraph Nine of the complaint, except that they incorporate herein by reference said stipulation of January 31, 1940, and except

that they deny that the use of the letters "MD" in connection with the sale of M. D. Medicated Douche Powder have prejudiced or deceived the public or constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

Wherefore, these respondents pray that the said complaint against these respondents be dismissed.

STANLEY LABORATORIES,

INC. a corporation and

EDWARD A. BACHMAN,

trading as

STILLMAN PRODUCTS

COMPANY and as

STANLEY LABORATORIES

Per /s/ EDWARD A. BACHMAN

411 Northwest Broadway

Portland, Oregon.

/s/ JAMES J. HAYDEN

737 Woodward Bldg.

Attorney for Respondents.

Filed June 15, 1940.

[Title of Commission and Cause.]

STIPULATION AS TO CERTAIN FACTS

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on May 7, 1940, issued its complaint against respondents and caused such complaint to be served as re-

quired by law, in which it was charged that respondents were and had been using unfair and deceptive acts and practices in commerce in violation of the provisions of said Act.

Hearings having been held before William C. Reeves, an Examiner of the Commission, at Washington, D. C., on July 30, 1940, Detroit, Michigan, on October 3, 1940, Portland, Oregon, on June 16, 17 and 18, 1941, and Seattle, Washington, on June 30, 1941, at which testimony and other evidence were introduced in support of and in opposition to the allegations of the complaint, and it being the desire of counsel to explain and clarify the record with respect to certain testimony of the respondent, Edward A. Bachman, appearing at pages 141, 153 and 183 of the record, relative to the change of the name of the corporate respondent from Stanley Laboratories, Inc., to Stanley Drug Products, Inc., the manner in which said change was effected, and the time thereof;

It Is Hereby Stipulated And Agreed by and between R. P. Bellinger, trial attorney for the Federal Trade Commission, and the respondents that the following statement of facts may be made a part of the record herein, and that the Commission may consider the matter and things set forth therein to the same extent and the same effect as if witnesses had duly testified in this proceeding as hereinafter stated at a hearing duly and regularly held.

STATEMENT OF FACTS

Paragraph One: The Federal Trade Commission has a competent witness available, to wit Lloyd R. Smith, Corporation Commissioner of the State of Oregon, who, if called, will testify that the corporate respondent herein, Stanley Laboratories, Inc. filed articles of incorporation with the Office of the Corporation Commissioner of the State of Oregon on August 9, 1937, and on May 16, 1941, filed supplementary articles, changing its name to Stanley Drug Products, Inc. The officers of the said corporation, Stanley Laboratories, Inc., as of May 16, 1941, and the officers who executed the supplementary articles changing said corporate name, as aforesaid, were E. A. Bachman, president; Emma-line Bachman, secretary; and William J. Ward, treasurer.

Dated this 10 day of October, A. D. 1941.

FEDERAL TRADE
COMMISSION

By R. P. BELLINGER,

Trial Attorney.

STANLEY LABORATORIES,
INC., and

EDWARD A. BACHMAN

By JAMES J. HAYDEN,

Counsel for Respondents.

Approved:

FEDERAL TRADE
COMMISSION

By OTIS B. JOHNSON,

Secretary.

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 31st day of March, A. D., 1942.

Commissioners:

William A. Ayres, Chairman,
Garland S. Ferguson,
Charles H. March,
Ewin L. Davis,
Robert E. Freer.

[Title of Cause.]

ORDER DENYING MOTION TO STRIKE
TESTIMONY OF EDWARD A. BACH-
MAN, DR. NORMAN A. DAVID, DR.
ALBERT HOLMAN, DR. THOMAS R.
MONTGOMERY, DR. FRANK CLANCEY,
AND DR. R. PHILIP SMITH, AND AL-
LOWING MOTION TO STRIKE TESTI-
MONY OF F. R. STIPE.

This cause coming on to be heard upon the motion of James J. Hayden, attorney for the respondents, filed July 25, 1941, to strike out certain testimony, which motion was denied by the trial examiner and subsequently renewed in respondents' brief before the Commission; and

It Further Appearing To The Commission that with the exception of the witnesses Edward A. Bachman and F. R. Stipe, the motion is directed to the expert testimony of several physicians, and charges (1) that the form of interrogation of the expert witnesses was based upon reading quoted

excerpts of advertising from the complaint and (2) that the experts were not qualified to testify as to the meaning of words used in advertising, particularly the letters "M. D.", or the meaning which such letters conveyed to the general public; and

It Further Appearing To The Commission that a stipulation was entered into upon the record in this case whereby it was stipulated that the excerpts of advertisements set out and quoted in the complaint were disseminated by the respondents and that copies of advertisements containing said representations were received in evidence as exhibits by agreement of counsel; and

It Further Appearing that the motion in part is directed to the form of the questions asked and the method used in the examination of the witnesses, rather than to the qualifications of the witnesses to give the testimony and the competency of the testimony so given; and

It Further Appearing that the testimony of the expert witnesses was based upon examination of the formula of respondents' product in evidence and its effectiveness in use in the light of the representations in respondents' advertising; and

It Further Appearing that all of said experts were well qualified to express opinion as to the value or efficacy of respondents' preparations, based upon their general medical and pharmacological knowledge; and

It Further Appearing that all of said experts were qualified to testify as to the meaning conveyed

to them personally by the use of the letter "M. D." in respondents' advertising, and, by reason of their experience and contact with the general public, were qualified also to testify as to the meaning which such letters as used in respondents' advertising conveyed to the general public; and

The Commission having duly considered said motion and the record herein, and being now fully advised in the premises;

It Is Ordered that the motion of James J. Hayden, attorney for the respondents, to strike certain portions of the testimony of Edward A. Bachman, Dr. Norman A. David, Dr. Albert Holman, Dr. Thomas R. Montgomery, Dr. Frank Clancey, and Dr. R. Philip Smith be, and the same hereby is, denied; and the motion to strike the testimony of the witness F. R. Stipe be, and the same hereby is, allowed.

By the Commission.

OTIS B. JOHNSON,
Secretary.

At a regular session of the Federal Trade Commission, held at its office in the city of Washington, D. C., on the 1st day of April, A. D. 1942.

Commissioners:

William A. Ayres, Chairman,
Garland S. Ferguson,
Charles H. March,
Ewin L. Davis,
Robert E. Freer.

[Title of Cause.]

FINDINGS AS TO THE FACTS AND
CONCLUSION

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on May 7, A. D., 1940, issued and subsequently served its complaint in this proceeding upon the respondents, Stanley Laboratories, Inc., a corporation, and Edward A. Bachman, an individual trading as Stillman Products Company and as Stanley Laboratories, charging them with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of said Act.

After the issuance of said complaint and the filing of respondents' answer thereto, testimony and other evidence in support of said complaint were introduced by R. P. Bellinger and Carrel F. Rhodes, attorneys for the Commission, and in opposition to the allegations of the complaint by James J. Hayden and Leo Levinson, attorneys for the respond-

ents, before William C. Reeves, a trial examiner of the Commission theretofore duly designated by it, and said testimony and other evidence were duly recorded and filed in the office of the Commission.

Thereafter, this proceeding regularly came on for final hearing before the Commission upon said complaint, answer thereto, testimony and other evidence, report of the trial examiner upon the evidence and exceptions filed thereto, briefs in support of the complaint and in opposition thereto, and oral arguments of counsel; and the Commission having duly considered the matter and being now fully advised in the premises, finds that this proceeding is in the interest of the public, and makes this its findings as to the facts and its conclusion drawn therefrom:

FINDINGS AS TO THE FACT

Paragraph One: Respondent Stanley Laboratories, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Oregon, with its principal place of business located in Portland, Oregon.

Respondent Edward A. Bachman is an individual trading as Stanley Laboratories, who also has his office and principal place of business in Portland, Oregon, in connection with, and located at the same address as, the corporate respondent. The respondent Edward A. Bachman is also president of the corporate respondent Stanley Laboratories, Inc., and controls and directs the business activities, sales policies and practices of the corporate respondent.

Paragraph Two: Respondents are now, and for more than one year last past have been, engaged in the business of selling and distributing certain drug products for feminine hygiene, including a product designated "M.D. Medicated Douche Powder." Respondents cause said products, when sold, to be transported from their place of business in the State of Oregon to purchasers thereof located in various other States of the United States and in the District of Columbia. Respondents maintain, and at all times mentioned herein have maintained, a course of trade in said products in commerce between and among the various States of the United States and in the District of Columbia.

Paragraph Three: In the course and conduct of their business, the respondents have disseminated and are now disseminating, and have caused and are now causing, the dissemination of false advertisements concerning their said products, by United States mails and by various other means in commerce as "commerce" is defined in the Federal Trade Commission Act; and respondents have also disseminated and are now disseminating, and have caused and are now causing the dissemination of, false advertisements concerning their said products, by various means, for the purpose of inducing, and which are likely to induce, directly or indirectly, the purchase of their said products in commerce as "commerce" is defined in the Federal Trade Commission Act.

Among and typical of the false, misleading, and

deceptive statements and representations contained in said false advertisements disseminated and caused to be disseminated as hereinabove set forth, by United States mails, by advertisements in newspapers, and by circulars, leaflets, folders, pamphlets, and other advertising literature, are the following:

“A Valuable Prescription For Discriminating Women . . . produced for discriminating modern women who desire a sanitary and dependable douche to insure their personal hygiene. It is but recently that scientific research has developed new and improved methods to safeguard the health and happiness of married women. Endorsed by physicians and surgeons. M. D. Medicated Douche Powder not only cleans the vagina, and soothes the delicate membrane tissue, but it has the added advantage of the protective action of oxyquinolin sulphate, a dependable safeguard. Because of its many other beneficial uses, ‘M. D.’ is also a very valuable household remedy . . . for cuts, sores and burns.”

“M. D. Medicated Douche Powder, endorsed by leading physicians and surgeons, is a germicide—soothing and cooling to delicate membranes with the addition of oxyquinolin sulphate—a reliable safeguard.”

“Medical science now answers the problems of millions of women with a truly effective, reliable antiseptic powder.”

“Effective in combatting any form of bacteria.”

“It relieves women of fatigue and the annoying discharge, often occasioned by all day standing.”

“Manufactured by Stanley Laboratories.”

Paragraph Four: Through the use of the aforesaid statements and representations, and others of similar import and meaning not specifically set out herein, the respondents represent, directly and by implication, that “M. D. Medicated Douche Powder” is a recent development of scientific research which is endorsed by leading physicians and surgeons; that said preparation is an antiseptic and germicide which will combat any form of bacteria; that such preparation has competent remedial qualities for use on cuts, sores, and burns; and that said preparation will relieve fatigue and annoying discharge sometimes connected therewith.

The use by the respondents of such descriptive words and phrases as “dependable,” “insure—personal hygiene,” “dependable safeguard,” “reliable safeguard,” and “effective, reliable antiseptic powder” in referring to, designating and describing said “M. D. Medicated Douche Powder,” has a tendency and capacity to cause purchasers and prospective purchasers to believe that said preparation is a preventative against conception and a prophylactic against disease.

Paragraph Five: Respondents’ preparation “M. D. Medicated Douche Powder” is composed of the following ingredients: alum, zinc, sulphate, boric acid powder, oxyquinolin sulphate, oil of white

thyme, oil of peppermint, phenol, and eucalyptol. This preparation is not a recent development of scientific research and is not endorsed by leading physicians or surgeons. The ingredient oxyquinolin sulphate is commonly used in douche powders and has a spermatocidal action in direct concentration. Under conditions of use, however, the proportion of oxyquinolin sulphate is so small as to have little or no therapeutic value. The ingredient phenol appearing in respondents' preparation is a germicide when used in sufficient concentration, but under the conditions of use in this preparation, this ingredient would have no germicidal properties and its effect would be solely that of an antiseptic. The use of oxyquinolin sulphate and phenol in sufficient concentration to act as a germicide, would have a tendency to irritate and damage the mucous membrane and other tissue with which it might come in contact.

A bacteriologist who testified on behalf of the respondents, made a test of respondents' preparation "M. D. Medicated Douche Powder" and found that dilutions of one teaspoonful to a pint, and one teaspoonful to a quart, had the ability to restrain the growth of test organism, indicating that the preparation had a bacteriostatic, or germ-inhibiting substance in it and indicating antiseptic properties. Under the conditions of use, the germ-inhibiting ingredients of respondents' preparation do not remain in direct or concentrated contact similar to that of a laboratory test and, consequently, the therapeutic value of this preparation is limited to that of a mild

antiseptic. This preparation has little or no therapeutic value in the treatment of cuts, sores, and burns. The use of this preparation in the form of a douche might temporarily clean out the vaginal tract but has no value in relieving fatigue and will not affect the cause of any discharge. Under conditions of use this preparation does not have either spermaticidal or germicidal properties and will not constitute a preventative against conception, in excess of the mechanical effect of flushing the vagina, and is not a prophylactic against disease.

Paragraph Six: In addition to the above representations, the respondents, by the use of the term "Laboratories" in their corporate and trade names, and in their advertising literature, also represent that they own, operate, and control a laboratory equipped for the compounding of medicinal preparations and for research in connection therewith. In truth and in fact, the respondents neither own nor control any factory, plant, or laboratory wherein their medicinal preparations are compounded or wherein any research activities are conducted, but, instead, respondents are merely distributors of products compounded and manufactured by other concerns.

Paragraph Seven: In addition to the statements and representations hereinabove set forth, the respondents make false, deceptive and misleading representations to the effect that their products are either prescribed or compounded by physicians or that they bear the endorsement or recommendation

of the medical profession by means of the use of the letters "M. D." in designating their product "M. D. Medicated Douche Powder" and by including therewith in advertising, the likeness of nurses and doctors, with the figure of a cross in simulation of the American Red Cross emblem. In truth and in fact, said products are not prescribed or compounded by a physician or physicians and they have not received the endorsement or recommendation of the medical profession, and the use of the letters "M. D." either alone or in combination with the likeness of nurses and doctors and the figure of a cross, has a tendency and capacity to cause members of the purchasing public to believe that products so designated and described are endorsed and recommended by the medical profession. The use of a cross simulating the American Red Cross emblem in design, either alone or in combination with the letters "M. D." or with the picture of a nurse or doctor, has a tendency and capacity to cause members of the purchasing public to believe that the product is in some way endorsed or approved by the American Red Cross.

Paragraph Eight: The Commission further finds that there is not sufficient evidence in the record as to the dissemination of any particular advertisement with reference to respondents' preparations "Contra-Jel," "Supercones," and "Femeze" to warrant any finding involving these products.

Paragraph Nine: The use by the respondents of the foregoing false, deceptive and misleading state-

ments, representations and advertisements disseminated as aforesaid, has had, and now has, the capacity and tendency to, and does, mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such false statements, representations and advertisements are true, and causes a portion of the purchasing public, because of such erroneous and mistaken belief, to purchase respondents' preparations.

CONCLUSION

The aforesaid acts and practices of the respondents, as herein found, are all to the prejudice and injury of the public, and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

By the Commission.

[Seal] W. A. AYRES,
Chairman.

Dated this 1st day of April, A. D., 1942.

Attest:

OTIS B. JOHNSON,
Secretary.

At a regular session of the Federal Trade Commission, held at its office in the city of Washington, D. C., on the 1st day of April, A. D. 1942.

Commissioners:

William A. Ayres, Chairman,
Garland S. Ferguson,
Charles H. March,
Ewin L. Davis,
Robert E. Freer.

[Title of Cause.]

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answer of the respondents, testimony and other evidence taken before William C. Reeves, a trial examiner of the Commission theretofore duly designated by it, in support of the allegations of the complaint and in opposition thereto, report of the trial examiner upon the evidence and exceptions filed thereto, briefs in support of the complaint and in opposition thereto, and oral arguments of counsel; and the Commission having made its findings as to the facts and its conclusion that said respondents have violated the provisions of the Federal Trade Commission Act;

It is Ordered that the respondents, Stanley Laboratories, Inc., a corporation, and its officers, and Edward A. Bachman, an individual trading as

Stanley Laboratories, and their respective representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of their preparation "M. D. Medicated Douche Powder," or any other preparation of substantially similar composition or possessing substantially similar properties, whether sold under the same name or under any other name, do forthwith cease and desist from:

(1) Disseminating, or causing to be disseminated, any advertisement, by means of the United States mails, or by any means in commerce as "commerce" is defined in the Federal Trade Commission Act, which advertisement represents, directly or through inference;

(a) That respondents' preparation is a recent development of scientific research, or that it is endorsed by physicians and surgeons;

(b) That respondents' preparation has **either** germicidal or spermatocidal properties under conditions of use;

(c) That respondents' preparation will combat any form of bacteria, or that it will have any effect upon any bacteria in excess of that of a mild antiseptic;

(d) That respondents' preparation has any substantial therapeutic value in the treatment of cuts, sores, or burns;

(e) That the use of respondents' preparation will relieve fatigue or have any effect upon the cause of vaginal discharge;

(f) That the use of respondents' preparation constitutes a preventative against conception, in excess of the mechanical effect of flushing the vagina;

(g) That respondents' preparation constitutes a prophylactic against disease:

(2) Disseminating or causing to be disseminated any advertisement by means of the United States mails, or by any means in commerce as "commerce" is defined in the Federal Trade Commission Act, which advertisement in designating or describing respondents' preparation "M. D. Medicated Douche Powder" or any other preparation of substantially similar composition or possessing substantially similar properties, or the effectiveness of the use of such preparation, uses the words "dependable," "dependable safeguard," "reliable safeguard," "effective reliable antiseptic powder," or any other words of similar import or meaning, in such a manner as to infer or imply that such preparation is a contraceptive or prophylactic;

(3) Disseminating, or causing to be disseminated, any advertisement by any means, for the purpose of inducing, or which it likely to induce, directly or indirectly, the purchase in commerce or "commerce" is defined in the Federal Trade Commission Act, of respondents' preparation, which advertisement contains any of the representations prohibited in paragraphs (1) and (2) hereof and the respective subdivisions thereof;

(4) The use of the letters "M. D." in respond-

ents' trade name, or in any other manner, either alone or in conjunction with the picturization of a doctor, nurse, or cross, to designate or describe respondents' preparation or any other preparation which has not been endorsed or recommended by the medical profession;

(5) The use of the picturization of a cross or any other simulation of the American Red Cross emblem, either alone or in conjunction with the picturization of a doctor or a nurse, to designate or describe respondents' preparation;

(6) Use of the word "Laboratories" or any other word of similar import or meaning in respondents' corporate or trade name, or representing through any other means or device, or in any manner, that the respondents own, operate, or control a laboratory equipped for the compounding of medicinal preparations and for research in connection therewith.

It Is Further Ordered that the respondents shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which they have complied with this order.

By the Commission.

[Seal]

OTIS B. JOHNSON,
Secretary.

[Title of Commission and Cause.]

PROCEEDINGS

Trial Examiner Reeves: We will proceed in the matter of Stanley Laboratories, Inc., a corporation, and Edward A. Bachman, an individual, trading as Stillman Products Company and as Stanley Laboratories, Docket No. 4130, pursuant to order of the Federal Trade Commission, dated July 23, 1940.

The following appearances may be noted:

For the Commission, R. P. Bellinger; for the respondents, James J. Hayden.

The attention of respondents and their counsel is called to the fact that any person desiring a copy of the testimony taken or evidence received in this proceeding may obtain an order blank for that purpose from the official reporter, and the cost of the transcript is fixed by contract between the Commission and the Official Reporter. The Official Reporter is not an employee of the government.

Are there any statements or motions for the record?

Mr. Bellinger: May it please your Honor, we have a stipulation, somewhat in detail, which I would like to read into the record, and which the respondent will admit as facts.

Trial Examiner Reeves: You have an arrangement with counsel for the respondent as to putting this stipulation into the record?

Mr. Bellinger: Yes, sir.

Trial Examiner Reeves: You may proceed, Mr. [2*] Bellinger.

Mr. Bellinger: The following stipulation of facts is admitted by the respondent.

1. Respondent Stanley Laboratories, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the state of Oregon, with its principal place of business located in Portland, Oregon. Respondent Edward A. Bachman is an individual, trading as Stanley Laboratories, who also has his office and principal place of business in Portland, Oregon, in connection with and located at the same address as the corporate respondent above named. The Respondent Edward A. Bachman is also president of the corporate respondent Stanley Laboratories, Inc., and controls and directs the business activities, sales policies and practices of the corporate respondent.

2. Respondents are now, and for more than one year last past, have been, engaged in the business of selling and distributing certain drug products for feminine hygiene.

Respondents designate their said products sold and distributed as "M.D. Medicated Douche Powder," "Contra-Jel," "Femeze," and "M.D. Supercones".

Respondents cause said products, when sold, to be transported from their place of business in Oregon to the purchasers thereof located in various other states of the United States and in the District

*Page numbering appearing at top of page of original Reporter's Transcript.

of Columbia, except that [3] the sale of Contra-Jel and Femeze was discontinued in interstate commerce on February 4, 1938, and the sale of M. D. Supercones in interstate commerce was discontinued in 1937.

Respondents maintain, and at all times mentioned herein have maintained, a course of trade in said products in commerce between and among the various states of the United States and in the District of Columbia.

3. In the course and conduct of their aforesaid business, respondents disseminated prior to the 10th day of May, 1938, false advertisements concerning their said products, by the United States mails and by various other means in commerce, as commerce is defined in the Federal Trade Commission Act, for the purpose of inducing, and which are likely to induce, directly or indirectly, the purchase of said products; and respondents have also disseminated and have caused prior to the 10th day of May, 1938, the dissemination of false advertisements concerning their said products, by various means, for the purpose of inducing, and which are likely to induce directly or indirectly, the purchase of their said products in commerce, as commerce is defined in the Federal Trade Commission Act. Among and typical of the false, misleading and deceptive statements and representations contained in said false advertisements disseminated and caused to be disseminated as hereinabove set forth by the United States mails, by advertisements in newspapers, and by [4] circulars, leaflets, folders, pamphlets and other adver-

tising literature, are the following which contain said false, misleading and deceptive statements and representations:

1. As to M. D. Medicated Douche Powder:

“A valuable Prescription for Discriminating Women . . . produced for discriminating modern women who desire a sanitary and dependable douche to insure their personal hygiene. It is but recently that scientific research has developed new and improved methods to safeguard the health and happiness of married women. Endorsed by physicians and surgeons. M. D. Medicated Douche Powder not only cleanses the vagina, and soothes the delicate membrane tissue, but it has the added advantage of the protective action of oxyquinolin sulphate, a dependable safeguard. Because of its many other beneficial uses, ‘M. D.’ is also a very valuable household remedy . . . for cuts, sores and burns.”

“M.D. Medical Douche Powder, endorsed by leading physicians and surgeons, is a germicide—soothing and cooling to delicate membranes with the addition of oxyquinolin sulphate—a reliable safeguard.”

“Medical science now answers the problems of millions of women with a truly effective, reliable and antiseptic powder.

“Effective in combating any form of bacteria.”

“It relieves women of fatigue and the annoying [5] discharge, often occasioned by all-day standing.”

“Manufactured by Stanley Laboratories.”

2. As to Contra-Jel:

“Contra-Jel is the highest quality vaginal anti-septic in jelly form. Its consistency insures even dis-

tribution and prolonged contact with every part of the vaginal tract, and its protective action endures as long as it remains within the vagina . . .”

“Contra-Jel is a harmless, non-irritating vaginal antiseptic and prophylactic . . . it is more convenient, sanitary and effective than are douches, tablets, capsules or suppositories.”

3. As to M.D. Supercones:

“They are stable and do not lose their antiseptic strength . . . a powerful yet non-irritating antiseptic . . . M.D. Supercones remain in effective antiseptic contact for many hours . . . They are actually soothing and beneficial as well as antiseptic.”

4. As to Femeze:

“Femeze has been found to be a simple effective prescription, affording relief for the functional pains and cramps accompanying menstruation . . . bringing relief in a short time by relaxing the contracted womb muscles, allowing them to react in a natural way. It does not merely deaden your nerves with drugs or narcotics to stop the pain. Femeze [6] contains no narcotics.”

Paragraph 4. Through the use of the aforesaid statements and representations and others of similar import and meaning not specifically set out herein, the respondents represent directly and by implication:

1. That M.D. Medicated Douche Powder is a recent development of medical research which is endorsed by leading physicians and surgeons; that said preparation is a competent and effective con-

traceptive; that said preparation is an antiseptic and germicide which will combat any form of bacteria; that such preparation has competent remedial qualities for use on cuts, sores and burns, and that said preparation will relieve fatigue and annoying discharge connected with the menstrual period.

2. That Contra-Jel gives immunity from pregnancy, protection from venereal disease, and has germicidal and antiseptic properties.

3. That M.D. Supercones constitute an effective contraceptive which has powerful antiseptic properties.

4. That Femeze is an effective treatment for functional pains and cramps which accompany menstruation and that said preparation will relax the womb muscles, allowing them to react in a natural way.

Paragraph 5: In truth and in fact, the product M.D. Medicated Douche Powder is not a recent development of [7] scientific research and is not endorsed by leading physicians or surgeons. This preparation would have very little therapeutic value in the treatment of cuts, sores and burns generally. Such preparation has no therapeutic value in relieving fatigue or discharge connected with the menstrual period.

Respondents' preparation Femeze is not an effective treatment for functional pains and cramps in excess of possible lessening of sensitivity to pain which might accompany menstruation. There is no scientific basis for the representation that this preparation will relieve menstrual pain by relaxing the womb muscles and allowing them to react in a natural

way, and respondents' preparation will not accomplish such results.

Paragraph 6: In addition to the above representations, the respondents, by the use of the term "laboratories" in their corporate and trade names, and in their advertising literature, also represent that they own, operate and control a laboratory equipped for the compounding of medicinal preparations and for research in connection therewith. In truth and in fact the respondents neither own nor control any factory, plant or laboratory wherein their medicinal preparations are compounded or wherein any research activities are conducted, but instead the respondents are merely distributors of products compounded and manufactured by other concerns.

Paragraph 7: The use by the respondents of the [8] foregoing false, deceptive and misleading statements, representations and advertisements as set forth in paragraph 3 of the complaint and disseminated as aforesaid has had the capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such false statements, representations and advertisements are true, and has caused a portion of the purchasing public, because of such erroneous and mistaken beliefs, to purchase respondents' said preparations.

Mr. Bellinger: I have some exhibits here, which, with permission of counsel for the respondents, I will now introduce.

I offer in evidence, marked Commission's Exhibit No. 1, a box designated as "M.D. Supercones".

Trial Examiner Reeves: Are there any contents?

Mr. Bellinger: Yes.

Trial Examiner Reeves: You did not mention the contents in your offer.

Mr. Bellinger: Well, it is a box designated as "M.D. Supercones," containing apparently 12 of the cones.

Trial Examiner Reeves: Is there any objection? [9]

Mr. Hayden: No objection.

Trial Examiner Reeves: This is received in evidence as Commission's Exhibit No. 1.

Mr. Bellinger: I now offer in evidence, marked Commission's Exhibit No. 2, a small package, designated as "Femeze".

Trial Examiner Reeves: This is received in evidence as Commission's Exhibit No. 2.

Mr. Bellinger: I offer in evidence, marked as Commission's Exhibit No. 3, a tin plate, apparently, designated thereon "M.D. Medicated Douche Powder," which apparently is the usual container of that product. It is merely straightened out instead of in the form in which it is when it contains the product.

Trial Examiner Reeves: Is there any objection?

Mr. Hayden: There is no objection.

Trial Examiner Reeves: This is received in evidence as Commission's Exhibit No. 3.

Mr. Bellinger: I offer in evidence, marked [10] Commission's Exhibit No. 4, a glass tube, about five inches in length, which comes with the package of

Contra-Jel, and is intended for use in the application of that product.

Trial Examiner Reeves: This is received in evidence as Commission's Exhibit No. 4.

Mr. Bellinger: I offer in evidence, marked Commission's Exhibit No. 5, a tube of this product known as Contra-Jel.

Trial Examiner Reeves: This is received in evidence as Commission's Exhibit No. 5

Mr. Bellinger: I offer in evidence, marked Commission's Exhibit No. 6, a small paper package, containing a powdered preparation, which is designated thereon as "M.D. Medicated Douche Powder".

Trial Examiner Reeves: This is received in evidence as Commission's Exhibit No. 6.

Mr. Bellinger: I offer in evidence, marked Commission's Exhibit No. 7, pasteboard carton, with the designation thereon "Contra-Jel". [11]

Trial Examiner Reeves: This is received in evidence as Commission's Exhibit No. 7.

Mr. Bellinger: I offer in evidence, marked Commission's Exhibit No. 8-A and B, a leaflet, which is entitled "A Valuable Prescription For Discriminating Women".

Trial Examiner Reeves: This is received in evidence as Commission's Exhibit No. 8-A and B.

Mr. Bellinger: I offer in evidence, marked Commission's Exhibit No. 9, leaflet entitled "Femeze Tablets".

Trial Examiner Reeves: This is received in evidence as Commission's Exhibit No. 9.

Mr. Bellinger: I offer in evidence, marked Com-

mission's Exhibit No. 10, a circular headed "For The Physician's Information".

Trial Examiner Reeves: This is received in evidence as Commission's Exhibit No. 10.

Mr. Bellinger: I offer in evidence, marked [12] Commission's Exhibit No. 11, a can containing a powder preparation designated on the outside as "M.D. Medicated Douche Powder".

Trial Examiner Reeves: This is received in evidence as Commission's Exhibit No. 11.

Mr. Bellinger: I now move that the papers marked Commission's Exhibits 12, 13 and 14 for identification be accepted in evidence.

EXCERPT FROM COMMISSION'S EXHIBIT NO. 12

"Medical science now answers the problems of millions of women with a truly effective, reliable anti-septic powder."

EXCERPT FROM COMMISSION'S EXHIBITS NOS. 12, 13

"M. D. Medicated Douche Powder, endorsed by leading physicians and surgeons, is a germicide—soothing and cooling to delicate membranes with the addition of oxyquinolin sulphate—a reliable safeguard."

Trial Examiner Reeves: These papers will be received in evidence as Commission's Exhibits 12, 13 and 14.

Mr. Bellinger: I offer this document, marked as Commission's Exhibit No. 15, in evidence.

Mr. Hayden: No objection:

EXCERPT FROM COMMISSION'S EXHIBIT
NO. 15

"It relieves women of fatigue and the annoying discharge, often occasioned by all day standing."

Trial Examiner Reeves: The document is received in evidence as Commission's Exhibit No. 15. [13]

Mr. Bellinger: I offer in evidence, may it please the Examiner, a power of attorney from the respondent to his counsel, Mr. Hayden, dated January 3, 1940.

Trial Examiner Reeves: This is received in evidence as Commission's Exhibit No. 16.

Mr. Bellinger: I offer in evidence, letter dated January 31, 1940, from respondents' counsel, James J. Hayden, Esq., to the Commission, consisting of three typewritten pages attached to each other, marked respectively Commission's Exhibit 17-A, B and C.

Trial Examiner Reeves: These are received in evidence as Commission's Exhibit 17-A, B and C.

[14]

Mr. Bellinger: I will now offer in evidence, Commission's Exhibit No. 18, which is the formula for M. D. Medicated Douche Powder, in the amount of 403 pounds.

Trial Examiner Reeves: This is received in evidence as Commission's Exhibit No. 18.

Mr. Hayden: All right; on information fur-

nished by M. E. Bachman, M. D., the Commission is informed that the formula for M. D. Medicated Douche Powder is as follows:

Alum	15 drams
Zinc Sulphate	6 drams
Boracic Acid Powder.....	12 ounces
Oxyquinolin Sulphate.....	1 dram
Oil of White Thyme	5 drops
Oil of Peppermint	1½ dram
Phenol	2 drams
Eucalyptol	3 drops

[15]

Making a total of 16 ounces.

Mr. Bellinger: I now propose this for the record as the formula for M.D. Supercone:

Boracic Acid	5 grains
Oxyquinolin Sulphate	1 grain
Salicylic Acid	grain
Mercuric Iodide Red	1/200 grain
Coco Butter QS—	

You agree that that is the formula?

Mr. Hayden: That that is the information furnished. I am satisfied it is; I do not know, but I am willing to stipulate that it is.

Mr. Bellinger: Well, it is agreed by counsel for the Commission and counsel for the respondent that the formula just read is the formula for M.D. Supercones.

I now offer in evidence a letter dated June 22, 1938, from Stanley Laboratories, Inc., to the Commission, marked Commission's Exhibit No. 19.

Trial Examiner Reeves: This is received in evidence as Commission's Exhibit No. 19.

Mr. Bellinger: I offer in evidence a letter dated June 21, 1940, from James J. Hayden, Esq., attorney for the respondents, to the Commission, marked Commission's Exhibit [16] No. 20.

Trial Examiner Reeves: This is received in evidence as Commission's Exhibit No. 20.

LAW OFFICE
JAMES J. HAYDEN
WOODWARD BUILDING
WASHINGTON, D. C.

Commis. G. 20

FEDERAL TRADE COMMISSION
DOCKET No. 4130 COMMISSION'S EXHIBIT No. 20
IN THE MATTER OF Stanley Lab.
DATE 7/30/40 WITNESS _____
BY Gallagher OFFICIAL REPORTER

June 21, 1940.

Federal Trade Commission
Washington, D.C.



In re: Federal Trade Commission
vs. E. A. Bachman, et al
Docket Number 4130

Gentlemen:

For the purpose of simplifying the record in the above cause, I suggest that a stipulation of the following matters be incorporated into a hearing and made a part of the final record in this case, as follows:

- (1) Respondents admit the material allegations of fact in Paragraph One of the complaint.
- (2) Respondents admit the material allegations of fact in Paragraph Two of the complaint.
- (3) Respondents admit the material allegations of fact in Paragraph Three of the complaint.
- (4) Respondents admit the material allegations of fact in Paragraph Four of the complaint.
- (5) Respondents admit the material allegations of fact in Paragraph Five of the complaint.
- (6) Respondents admit the material allegations of fact in Paragraph Seven of the complaint.

Very truly yours,

James J. Hayden
James J. Hayden
Attorney for Respondents
in above cause.

Mr. Bellinger: I offer in evidence Commission's Exhibit 21, which is a copy of an invoice of Stanley Laboratories, Inc., Portland, Oregon, dated August 24, 1938. That will be marked Commission's Exhibit 21.

Trial Examiner Reeves: This is received in evidence as Commission's Exhibit 21.

Mr. Bellinger: We offer Commission's Exhibit No. 22, which is a copy of an invoice of Stanley Laboratories, Inc., Portland, Oregon, dated August 19, 1938.

Trial Examiner Reeves: This is received in evidence as Commission's Exhibit No. 22.

Mr. Bellinger: I offer Commission's Exhibit No. 23, copy of an invoice from Stanley Laboratories, Inc., Portland, Oregon, dated October 28, 1938.

Trial Examiner Reeves: This is received in evidence as Exhibit No. 23. [17]

Mr. Bellinger: I offer as Commission's Exhibit No. 24 copy of an invoice of Stanley Laboratories, Inc., Portland, Oregon, dated September 3, 1938.

Trial Examiner Reeves: This is received in evidence as Commission's Exhibit No. 24.

Mr. Bellinger: I offer in evidence a leaflet, entitled "A Valuable Prescription For Discriminating Women", which is marked Commission's Exhibit 25-A and B.

Trial Examiner Reeves: It is received in evidence as Commission's Exhibit 25-A and B.

Mr. Bellinger: I offer leaflet or folder, entitled "2 Valuable Prescriptions For Discriminating Women", as Commission's Exhibit 26-A and B.

Trial Examiner Reeves: It is received in evidence as Commission's Exhibit 26-A and B.

Mr. Bellinger: I offer a leaflet or circular, designated as "coupon", marked Commission's Exhibit 27-A and [18] B.

Trial Examiner Reeves: This is received in evidence as Commission's Exhibit 27-A and B.

Mr. Bellinger: I offer leaflet designated as "Valuable Coupon", marked Commission's Exhibit No. 28.

Trial Examiner Reeves: It is received as Commission's Exhibit No. 28.

Mr. Bellinger: I offer a leaflet designated as "Valuable Coupon", and relating to M.D. Supercones, marked Commission's Exhibit 29-A and B.

Trial Examiner Reeves: It is received in evidence as Commission's Exhibit 29-A and B.

Mr. Bellinger: I offer in evidence a leaflet entitled "Femeze", marked Commission's Exhibit 30-A and B.

Trial Examiner Reeves: It is received in evidence as Commission's Exhibit 30-A and B.

Mr. Bellinger: I offer a folder or leaflet [19] designated "M.D. Medicated Douche Powder", marked Commission's Exhibit 31-A and B.

Trial Examiner Reeves: It is received in evidence as Commission's Exhibit 31-A and B.

Mr. Bellinger: I will say, then, that I offer in evidence the ad in the extreme lower left corner of page 17 of the Oregon Daily Journal, of Portland, Oregon, of Wednesday, April 20, 1938.

Trial Examiner Reeves: This is received as Commission's Exhibit No. 32.

Mr. Bellinger: I offer in evidence the ad in the extreme lower left corner of the Daily Olympian, of Olympia, Washington, of Wednesday, March 23, 1938, as Commission's Exhibit No. 33. [20]

Trial Examiner Reeves: This is received in evidence as Commission's Exhibit No. 33.

Mr. Bellinger: I offer the ad of M.D. Medicated Douche Powder in the seventh column on page 3 of the Daily Olympian, Olympia, Washington, newspaper, dated March 23, 1938, marked Commission's Exhibit No. 34.

Trial Examiner Reeves: This is received in evidence as Commission's Exhibit No. 34.

Mr. Bellinger: I offer in evidence the ad of M.D. For Feminine Hygiene, column 5, page 4 of the Register Guard, Eugene, Oregon, newspaper, dated March 23, 1938, marked Commission's Exhibit No. 35.

Trial Examiner Reeves: This is received in evidence as Commission's Exhibit No. 35.

Mr. Bellinger: I offer the ad located in the lower left corner of page 6 of the Seattle Post-Intelligencer, Seattle, Washington, of Wednesday, May 6, 1936, marked Commission's Exhibit No. 36.

Trial Examiner Reeves: This is received in evidence [21] as Commission's Exhibit No. 36.

Mr. Bellinger: I offer in evidence leaflet or folder entitled "A Valuable Prescription For Discriminating Women", marked Commission's Exhibit No. 37-A and B.

Trial Examiner Reeves: This is received in evidence as Commission's Exhibit No. 37-A and B.

Mr. Bellinger: I offer a leaflet or folder of Stanley Laboratories, marked Commission's Exhibit 38-A and B.

Trial Examiner Reeves: This is received in evidence as Commission's Exhibit 38-A and B.

Mr. Bellinger: I offer leaflet or folder entitled "2 Valuable Prescriptions For Discriminating Women", marked Commission's Exhibit 39-A and B.

Trial Examiner Reeves: This is received in evidence as Commission's Exhibit 39-A and B. [22]

EXCERPTS FROM EXHIBITS

Com. Exs. 8-A-B, 25-A-B, 26-A-B, 37-A-B, 39-A-B "A Valuable Prescription for Discriminating Women . . . produced for discriminating modern women who desire a sanitary and dependable douche to insure their personal hygiene. It is but recently that scientific research has developed new and improved methods to safeguard the health and happiness of married women. Endorsed by physicians and surgeons. M. D. Medicated Douche Powder not only cleans the vagina, and soothes the delicate membrane tissue, but it has the added advantage of the protective action of oxyquinolin sulphate, a dependable safeguard.

Because of its many other beneficial uses, 'M. D.' is also a very valuable household remedy . . . for cuts, sores and burns."

Mr. Bellinger: I will ask Mr. Marcellino to take the stand.

CHARLES MARCELLINO

was called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Bellinger:

Q. Your name is what?

A. Charles Marcellino.

Q. Your address is what, Mr. Marcellino?

A. 3653-34th Street, Northeast. That is in Mt. Ranier, Maryland.

Q. You are in business here, are you, Mr. Marcellino?

A. Yes.

Q. What is your business address, or is it that which you have just given us?

A. That is it; yes.

Q. What business are you engaged in?

A. Shoe repairing.

Q. How long have you lived in Washington?

A. I am living in Mt. Ranier. I have been out there a year. Mt. Ranier is right over the line.

Q. Now, Mr. Marcellino, I am going to, with the permission of the Examiner and counsel for the respondent, show you an [24] advertising sheet, which has been introduced in evidence in this case, and I am going to ask you to look at it and tell us, please, what that advertising means to you, so far as the products represented on that sheet are concerned.

A. Well, from the——

(Testimony of Charles Marcellino.)

Mr. Hayden: Just a minute, please. I do not quite see the point of this question. I wish counsel would state the purpose of his asking this witness this particular question. He has shown no connection with the case so far.

Mr. Bellinger: I do not think it is necessary, may it please the Examiner, to show any connection with the case. The witness has no connection with the case. He is merely a man who was asked to come in here from the public. We have alleged that this advertising is misleading, and now I want to show by him what that form of advertising represents to him, what it means to his mind.

Trial Examiner Reeves: You may proceed. The objection will be overruled.

The Witness: Why, it is, from looking at that——

Mr. Hayden: I note an exception, may it please the Examiner.

Trial Examiner Reeves: Exception noted.

By Mr. Bellinger:

Q. You may go right ahead.

A. From looking at that advertisement there, I believe [25] that it is—all of this has been endorsed by the doctors.

Q. All those products? That means to you that those products have been endorsed by the medical profession?

A. By the medical profession. That is it.

(Testimony of Charles Marcellino.)

Mr. Hayden: I suggest counsel is leading the witness, if the Examiner please.

Q. Why do you say that, Mr. Marcellino?

By Mr. Bellinger:

A. Well, for the simple reason that it has the M. D. and a cross. You take a doctor's name—they all have an M. D. on it, and that would suggest that to me.

Mr. Bellinger: No further questions.

Cross Examination

By Mr. Hayden:

Q. Mr. Marcellino, how did you happen to be called into this case?

A. Why, several years back one of these—I don't know just who it was, but someone came around to the shop and asked me about this, just asked me what I thought about it, and I just—he showed me a tissue paper—what I thought about it, and by looking at this “M. D.”, and that is about all.

Q. He showed you that piece of paper with the advertisement? A. That I don't know. [26]

Q. What did he show you?

A. I believe it was mostly tissue paper—M. D. tissue paper, I believe, or something.

Q. M. D. tissue paper? A. Yes.

Q. Do you mean toilet tissue paper?

A. That is it.

Q. Who was it that came to see you?

A. I really don't know—just one man came around.

(Testimony of Charles Marcellino.)

Q. Did he say who he was?

A. He probably gave me the name, but I can't remember it. He was only in there about five or ten minutes, and then went on out.

Q. And he asked you about that tissue paper?

A. No; what that advertisement, or whatever he had there, what that would mean in my mind.

Q. And what did you tell him?

A. I told him—I explained that—I explained that—I believe he asked me if that "M. D." would signify that was—well, I told him that "M. D." in my mind meant that it was passed by the doctors, and so forth and so on.

Q. And he asked you whether "M. D." would signify that to you?

A. Well, no, he didn't ask me that. He just asked me what I thought about it. [27]

Q. Did he point out the "M. D."?

A. That I couldn't say.

Q. How long ago was that?

A. A couple of years ago.

Q. He might have pointed out the "M. D." to you?

A. Because it was rather odd for someone to come around; it was the first time anybody ever came in the shop like that, and said anything. That is the way I remember it.

Q. Did he say he was from the Federal Trade Commission?

A. That I don't know. I didn't know whether he represented the company or——

(Testimony of Charles Marcellino.)

Q. Did he offer to sell you any M. D. Tissue?

A. Oh, no. He said he was going around getting different peoples' opinion on it.

Q. Well, did he tell you he was from the Federal Trade Commission?

A. I don't remember that, either.

Q. How did you happen to be called as a witness?

A. I just got this paper here this morning. I didn't know what it was all about, or anything, till just now.

Q. You didn't know you were John Q. Public?

A. No, I didn't.

Q. Did you ever see this paper before?

A. I am not sure whether I have or not. If I remember correct, I believe he did have a lot of paper of advertise- [28] ments of a different kinds.

Q. But the paper that he showed you a couple of years ago was not this paper?

A. I couldn't say for sure.

Q. How did you know it was a sample of tissue paper? A. In a book form, I believe.

Q. In a book? A. Yes.

Q. Like ordinary toilet paper, was it?

A. No. I believe he did have a roll of paper, and then he had pictures of it.

Q. And it said "M. D. Tissue"?

A. Yes.

Mr. Hayden: That is all.

(Testimony of Charles Marcellino.)

Recross Examination

By Mr. Hayden:

Q. One other question, Mr. Marcellino: Did the letters "M. D.", as shown to you on that tissue paper have periods after the letters? [29]

A. I am not sure.

Q. You don't remember that? A. No.

Q. Do you know any person whose initials are "M. D."?

A. Offhand, I couldn't say.

Q. Every time you see the letters "M. D.", do they indicate a doctor to you? A. Yes.

Q. Why?

A. Why, everyone I ever seen has a sign out front, has that on it.

Mr. Hayden: Mr. Examiner, I move that the testimony of Mr. Marcellino be stricken from the record, on the ground that what he has testified about has reference to M. D. Toilet Tissue Paper, which is not a product of this respondent.

Trial Examiner Reeves: The motion will be denied.

Mr. Hayden: I note an exception.

Trial Examiner Reeves: Exception noted. [30]

GEORGE H. CANDEY

was called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Bellinger:

Q. What is your full name, sir?

A. George H. Candey.

Q. What is your address, Mr. Candey?

A. 1118-18th Street, Northwest.

Q. Washington? A. Yes, sir.

Q. What business are you engaged in?

A. Hardware business.

Q. How long have you been so engaged?

A. I, myself, just three years.

Q. At that point—that place of location?

A. Yes, sir.

Q. Now, Mr. Candey, I am going to show you a specimen of advertising, which will be placed in evidence in this case, and I am going to ask you, please, to look at it and tell us, after reading it and viewing the pictures and the type, what impression that conveys to your mind as to the products [31] advertised?

A. Well, the first impression and the most outstanding one to my mind would be, if not necessarily put out by doctors, that it was certainly endorsed by doctors.

Q. Why, Mr. Candey?

A. Well, for one thing, the different pictures—the one here; it shows here “your doctor would tell you”, and that certainly would be taken for

(Testimony of George H. Candey.)

a doctor. Up here you have a picture of a nurse; you have the cross. Here is another picture of a nurse. Several of these small items mention endorsed or approved by a doctor or physician.

Q. So that you would get the belief that it was endorsed by the medical fraternity or profession?

A. I certainly would.

Q. Now, I am going to ask you, Mr. Candey, to look at the sheet of advertising, which has been introduced into the record as Commission's Exhibit No. 13, and I ask you what that means to your mind, as to the products involved?

A. Well, that they would have the same effect on it. I would still say they were approved by the doctors. Practically every one of them mentions a doctor in the advertisement, and naturally I would be led to think that a doctor endorsed it.

Q. Then, I will ask you as to the advertising sheet, which is marked Commission's Exhibit No. 14, would there be any [32] change in your mind as to that?

A. No. After reading through the advertisements, there would not be.

Q. I show you a package, marked Commission's Exhibit No. 11, Mr. Candey, and ask you what that would mean to your mind?

Trial Examiner Reeves: Do you mean the printed matter on the picture?

Mr. Bellinger: Yes; on the picture.

The Witness: Well, to my mind, it would be sup-

(Testimony of George H. Candey.)

posed to be a product either put out by a doctor or endorsed by a doctor and the nursing profession or medical profession, and, so, therefore, is supposedly a good product, endorsed by them.

Mr. Bellinger: That is all, Mr. Candey.

Cross Examination

By Mr. Hayden:

Q. When did you first see these exhibits?

A. As to the actual date I couldn't say.

Q. Well, approximately.

A. Approximately two years ago.

Mr. Bellinger: Let us get the record straight on that. You have him confused—not intentionally, but he has never seen these exhibits until today. The exhibits he has seen are the same ones that Mr. Marcellino saw. [33]

By Mr. Hayden:

Q. Have you ever been interviewed by a representative of the Federal Trade Commission, Mr. Candey?

A. Yes; I believe there was one. That is what I had reference to.

Q. When was that?

A. As I say, approximately two years ago.

Q. And what did he show you?

A. The only thing I can bring to my mind is the fact that he had a loose leaf—to my mind, it was a loose leaf notebook, a large size notebook, with different advertisements in it, and he wanted

(Testimony of George H. Candey.)

my opinion on certain ones of those, but at present——

Q. Did you know him?

A. No; I can't say that I knew him, and I couldn't definitely swear that I know what those advertisements were now.

Q. Was he a stranger when he came into your store? A. Absolutely.

Q. What advertisement did he show you?

A. Well, as I say, I couldn't definitely say that. That is quite a while ago.

Q. Can you testify that they were not the same ones as you have seen here this morning, Commission's Exhibit 12, 13 and 14?

A. I can say I don't believe they are. I wouldn't—— [34]

Q. What questions did he ask you?

A. Well, merely something on the order of the questions this morning, what the advertisements bring to my mind; that is, whether I would—just what they would represent to me.

Q. Did he point out the letters "M D"?

A. I wouldn't like to say that; that is, under oath.

Q. Well, you are not sure?

A. No; I am not sure.

Q. He may or he may not?

A. He may have. I couldn't say. As I say, that has been around two years ago.

Q. Did he ask you whether or not those letters

(Testimony of George H. Candey.)

or the information on the advertising suggested doctors to you?

A. I couldn't say that, although I believe he did. I couldn't say that definitely. When he came in, it was unexpected, and I never expected to have to refer to it again, and so, otherwise I might have paid more attention to what he did say.

Q. Did he show you samples of toilet tissue paper, with the letters "M. D." on them?

A. I couldn't say as to that.

Q. Well, did he bring any boxes of powder in with him? A. I don't believe so.

Q. Did he show you anything except papers in the notebook?

A. That is the only thing I can bring to my mind, is the [35] notebook of the advertisements.

Q. You can not remember whether that advertising was douche powder or toilet paper?

A. No; I can't remember as to that. I would be willing to say that it was regarding "M. D." products. As to which ones, I couldn't say.

Q. Have you ever bought medicated douche powder? A. No, sir.

Q. Have you ever read the advertisements for medicated douche powder?

A. Very seldom, that I know of.

Q. Have you ever read these particular advertisements, Exhibits 11, 12, 13 and 14, prior to this morning? A. I don't believe so.

Q. Now, did the papers that your visitor showed

(Testimony of George H. Candey.)

to you two years ago have periods after the letters "M D"? A. I couldn't say.

Q. He told you he was from the Federal Trade Commission? A. Yes, sir.

Q. Now, do the letters "M D" suggest anything to you outside of doctors?

A. No; that is the first thing that would come to my mind, because it is the most prominent usage of those two letters.

Q. Do you mean to say that every time you see the letters "M D", you think of nothing but doctors? [36]

A. Unless there would be something else to show entirely different from a doctor, that would be the first thing that would come to my mind.

Q. If you see the letters "M D" painted on a street, would that necessarily bring a doctor to your mind?

A. No, but if I saw it with a picture of a nurse or a cross, I think it would.

Q. If you saw the picture of a nurse or cross? What kind of a cross?

A. Well, the Red Cross, if you want to call it that, and a nurse. You find nurses usually have a cross on their cap.

Q. Does the association of a picture of a nurse with a cross bring the idea of a doctor to your mind?

A. It would be in this—the combination of the two.

Q. Well, if you saw the letters "M D", without

(Testimony of George H. Candey.)

the picture of a doctor or nurse or a cross, what would that suggest to you?

A. Well, if it was just two letters, I don't know that it would suggest anything particular. If it was after a name, there would be no question about what it would suggest.

Q. I did not ask you that. The letters standing by themselves would not necessarily suggest a doctor to you? A. No, sir.

Q. Is it not true that there are hundreds of people who have the initials "M. D."? [37]

A. I imagine there are.

Q. Don't you see the letters "M. D." in ordinary newspaper reading? A. No doubt.

Q. And the only time they suggest a doctor to you is when you associate them with a picture of a doctor or a nurse or a cross; is that right?

A. That would be my impression; yes.

Q. This Exhibit No. 12. Did you ever see that before this morning?

A. I don't believe so. I couldn't say definitely.

Q. You have not read everything in this advertisement even yet; have you? A. No, sir.

Q. Have you read any of it? A. Yes, sir.

Q. How much of it?

A. I have read one of the items under some of the pictures.

Q. You looked at the letters "M. D."?

A. Yes. [38]

JOHN WILLIAM BURROUGHS

was called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Bellinger:

Q. Mr. Burroughs, what is your full name?

A. John William Burroughs.

Q. What is your address?

A. 4852 Wisconsin Avenue, Northwest.

Q. Washington?

A. Yes; Washington, D. C.

Q. What is your business?

A. I am a service station attendant.

Q. In Washington? A. Yes, sir.

Q. How long have you been so engaged?

A. Six years at this place.

Q. Mr. Burroughs, I am going to show you an advertising [39] sheet, marked Commission's Exhibit No. 12, and ask you to please look at it and tell us, from looking at those specimens of advertising, what the reaction or meaning is to your mind as to the products therein advertised.

A. Well, to look at it, with the "M. D." and a cross and a picture of a nurse, I would say it was signed by doctors and medical association, and that it was a good powder, approved by them.

Q. Have you read any of the advertising there?

A. Yes; I read some of that.

Q. Does that change your mind about it to any extent? A. No.

Q. All right, sir. I will ask you, then, to please

(Testimony of John William Burroughs.)

look at the advertising sheet, marked Commission's Exhibit No. 13, and I will ask you if that has the same impression for you?

A. Yes; that is the same impression—all three of them.

Q. I will ask you, then, to look at Commission's Exhibit No. 14, and then tell us what you would be led to believe by that?

A. I believe the same thing. It is the same identical thing to me.

Q. All right. Will you please look at Commission's Exhibit No. 11, the can of powder, and tell us, if you saw that, what it would mean to you?

A. Well, I would think that it has been approved by [40] doctors.

Mr. Bellinger: That is all.

Trial Examiner Reeves: You may cross examine.

Cross Examination

By Mr. Hayden:

Q. Mr. Burroughs, are you married?

A. Yes, sir.

Q. Do you buy any medicated douche powder?

A. No, sir.

Q. Do you read medicated douche powder advertisements? A. No, sir.

Q. Did you ever see such an advertisement before? A. No, sir.

Q. How did you first happen to see this advertisement?

(Testimony of John William Burroughs.)

A. Just when he showed it to me. This here (indicating), you are referring to?

Q. These exhibits.

A. Just when he showed them to me.

Q. Were you ever visited by a representative of the Federal Trade Commission?

A. Yes; I was.

Q. When?

A. I imagine it has been two or two and a half years ago.

Q. What did he say to you?

A. Well, he didn't say much, because I was really busy [41] at the time, and he had a roll of toilet paper, which had a white cross on it, and he asked me what I thought that was, and I told him toilet paper. I didn't know exactly what he was talking about, and was busy at the time, and he says, "Well, what else do you get an impression of?" It had a cross and M. D. and all written all over it, and I told him—he asked me what I thought about it, and whether I thought that was good, that that sign was good for it, and I told him yes, just from my glancing at it, a doctor. That was all he said.

Q. So that he first pointed out the letters "M. D." and asked you if you had——

A. He just had a roll of toilet paper in his hand.

Q. Do you know who produced that roll of toilet tissue? A. No.

Q. You did not see the name of the manufacturer? A. No.

(Testimony of John William Burroughs.)

Q. When he asked you what it suggested to you?

A. No.

Q. He first showed you the roll of toilet paper, and when you looked at it, it never occurred to you that any doctor had any connection with it?

A. I didn't notice it when he first showed it to me, because I was awful busy. I didn't have the time. I think there was another fellow on duty, too, and we had a lot of cars coming up, and in a joking way, he asked me what it was, [42] and I told him toilet paper, and he said, "All right." That is all there was to it at first.

Q. In reference to this Exhibit No. 12, this large sheet, you have not seen that before this morning, have you?

A. No, sir; I have not.

Q. You have not read all these advertisements?

A. No.

Q. You testified, in looking at it, it looked to you as though it had been signed by doctors?

A. That is right.

Q. Do you see any doctor's signature on that paper?

A. No, but from the quality of the paper, with a picture of a nurse and a cap, and then a cross and "M. D.", would just bring that to my mind. Without thinking of anything, it would automatically just bring that to my mind.

Q. Do you think of a doctor every time you see a picture of a nurse?

A. Not every time, but when I see them all in combination, it would make you think of them.

(Testimony of John William Burroughs.)

Q. Do you think of a doctor every time you see the letters "M. D."? A. Oh, no.

Q. Will you look at Exhibit No. 10, and look at the signatures on any one or more of those advertisements, and tell me whether you see any doctor's name? [43] A. No, I do not.

Q. Now, will you read any one of them and tell me whether you see anything in the language of the advertisement to indicate that a doctor signed it?

Mr. Bellinger: As a matter of fact, Mr. Hayden, he did not testify that he thought a doctor signed any of them.

Mr. Hayden: Yes; he did.

Mr. Bellinger: No; he did not. This only refers to a single——

Mr. Hayden: No; on Exhibit No. 12, he said the reaction was that it had been signed by doctors or by the medical profession.

Mr. Bellinger: Go to the record.

Mr. Hayden: All right. Will you read back the answer to that first question about Exhibit No. 12?

(The Reporter read as follows:

("Q. Mr. Burroughs, I am going to show you an advertising sheet, marked Commission's Exhibit No. 12, and ask you to please look at it and tell us, from looking at those specimens of advertising, what the reaction or meaning is to your mind as to the products therein advertised.

(Testimony of John William Burroughs.)

(“A. Well, to look at it, with the ‘M. D.’ and a cross and a picture of a nurse, I would say it was signed by doctors and medical association, and that it [44] was a good powder, approved by them.”)

By Mr. Hayden:

Q. So you did say you thought it was signed by doctors? A. That is right.

Q. Look at the advertisement for Medicated Douche Powder, and tell me whether you see any doctor’s name signed to that?

A. No, I do not.

Q. If you read the advertisement and did not see a doctor’s name signed to it, would you still think it was signed by a doctor?

A. No, no. Not if I read it, I wouldn’t think it was signed by a doctor, if it wasn’t signed.

Q. Would you still think, if you read it, it had been approved by the medical profession, if no doctor’s name was on it? A. Yes; I would.

Q. Why?

A. Well, with the “M. D.” on it, the way it reads, I would say it was.

Q. For instance, this advertisement for medicated douche powder: The letters “M. D.” and “Medicated Douche Powder” follow that?

A. Yes.

Q. What is there to suggest that any medical association approved that product? [45]

(Testimony of John William Burroughs.)

A. Nothing any more than just seeing the picture of the nurse and the cross and the "M. D." That would still stand in my mind when I was reading it.

Q. Do you take it for granted every time you see the letters "M. D." that a doctor has some connection with it? A. No, I do not.

Q. When you see those letters on a can, does that mean that some medical association had something to do with it?

A. It doesn't mean it, but, to my mind, if it has a cross and a picture of a nurse and "M. D." on it, it does.

Q. Why?

A. Because that is my idea of how I would look at it.

Q. When you read the advertisement, would that change your mind, if you saw it was signed by Stanley Laboratories?

A. It would change my mind as far as thinking about doctors signing it; yes.

Q. If you would read it, you would have no longer the idea that any medical association approved it?

A. Well, no, I would still say, if it had that "M. D." that a medical association had something to do with it.

Q. What do you mean by "had something to do with it"?

A. Well, had approved it, that it was a good product.

(Testimony of John William Burroughs.)

Q. Does that advertisement say that any medical association ever approved it?

A. No; it doesn't say that. [46]

Q. You just guessed that?

A. From my remembrance of the picture, and reading it, I would just say that; that is all.

Q. What is there to lead you to believe that any medical association had approved M. D. Medicated Douche Powder?

A. Just the picture of the nurse and the cross and the "M. D." on the can.

Q. Then, every time you see a picture of a nurse or cross, you come to the conclusion that the medical association must have said that was good?

A. If it had "M. D." on it; yes.

Q. What difference does it make whether the letters "MD" had periods after them or not?

A. Well, if they had a period, it could be for the state of Maryland.

Q. What I mean is, if there was a period after the "M" and a period after the "D", would it make any difference?

A. Well, I don't know. I never seen one that did.

Q. How do you abbreviate doctor—a doctor of medicine? A. "MD".

Q. Do you add periods or not? A. No.

Q. Then, is it your understanding that those two letters "MD" without periods, stand for doctor?

(Testimony of John William Burroughs.)

A. To see it that way it does; yes. [47]

Q. And you think that periods are not needed there? A. No.

Q. Calling your attention to Exhibit No. 14, and looking at those pictures, are those women nurses?

A. I couldn't tell you.

Q. Do they look like nurses?

A. They don't look like nurses to me; no.

Q. Is there anything about the picture of those women that indicates to you that a doctor had anything to do with the production of that product?

A. No; unless I saw the can at the time.

Q. What is there on the can to indicate that a doctor had something to do with it?

A. The same thing—the nurse, cross and “M. D.”.

Q. Can you see a nurse on that can?

A. I sure can.

Q. You have good eyesight, brother.

A. That is a picture of a woman with a white cap on. Whether that is a nurse, I believe she is.

Q. You are not sure whether that is a nurse or not?

A. It looks like a nurse to me.

Q. As you look at that picture, you see four women there dressed in ordinary clothes?

A. That is right.

Q. There is nothing about the picture to indicate that a [48] doctor had something to do with the advertisement which is there?

A. Not of the four women; no.

(Testimony of John William Burroughs.)

Q. When you read the advertisement about M. D. Medicated Douche Powder, is there any doctor's name signed to it? A. No.

Q. No medical association's name signed to it?

A. No; not as far as I know.

Q. Then, there is nothing about that advertisement to indicate that any doctor had approved it or any medical association had approved it, except as you say, these letters "M. D."; is that right?

A. "M. D.", the picture of the cross, and what I say is a nurse in there.

Q. Calling your attention to the other picture on Exhibit 14, you see a picture of a girl, don't you? A. That is right.

Q. Nothing there to indicate a doctor; is there?

A. No, sir.

Q. She is just in ordinary clothes?

A. Just the picture of a girl is nothing to indicate a doctor; no.

Q. The only thing in that advertisement that suggests a doctor to you is the position of the letters "M.D."; is that right? [49]

A. And the picture of the nurse and the cross.

Redirect Examination

By Mr. Bellinger:

Q. After reading those advertisements, do you find anything in the wording of them that changes your mind from your first impression that it was endorsed by the medical profession?

A. Well, it isn't endorsed; after I read them,

(Testimony of John William Burroughs.)

I see it isn't endorsed, but that doesn't change my mind as to them. Offhand, from the picture of the nurse and the cross and that "M. D.", it gives me the idea that it has been endorsed by a doctor. [50]

FRANCIS J. O'DONNELL

was called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Bellinger:

Q. Doctor, what is your full name, please?

A. Francis J. O'Donnell.

Q. What is your address?

A. Business address?

Q. Well, it does not make any difference.

A. 5502 Colorado Avenue.

Q. What business are you engaged in, Doctor?

A. Drug business.

Q. Are you proprietor of the drug store at that location? A. Yes.

Q. How long have you been so engaged? [51]

A. Between 16 and 17 years. It will be 17 years on the 24th of January.

Q. And you have been at that same stand all the time? A. Yes, sir.

Q. Now, Doctor, I am going to show you Commission's Exhibit No. 12, and ask you to tell us, after looking at it and reading it, what impression

(Testimony of Francis J. O'Donnell.)

that has upon your mind as to the product therein advertised? What does it mean to you?

Mr. Hayden: Mr. Examiner, I think I will have to move to strike the question, on the ground that it is leading, that it does not call for facts, and that it is asking for conclusions.

Mr. Bellinger: That is the only way I know to prove, your Honor, the custom and practice of advertising and what it conveys to the mind of the prospective buyer.

Trial Examiner Reeves: The objection will be overruled.

Mr. Hayden: An exception, please?

The Witness: It looks like to me it was put out by a doctor or endorsed by a doctor or by a medical society.

By Mr. Bellinger:

Q. Why, Doctor?

A. Well, the "M. D." and the nurse and the cross are there, and the picture of the doctor right here (indicating)—"Your Doctor Will Tell You"—there is no other impression [52] that it could leave on anyone's mind. That is as far as I am concerned, and the fact that the "M D" up here has no periods behind it, and down here (indicating), it has, in the small one; so that means doctor to me. It has got periods behind each "M. D." down in the small advertisement, but on the package here there are no periods between the "M" and "D" there.

(Testimony of Francis J. O'Donnell.)

Q. What impression does that convey to your mind?

A. Doctor—put out by a doctor or endorsed by a medical society, and it has in there the doctor, right here in that advertisement (indicating); it really looks as though the doctor is talking to the public and to the woman that uses the powder. That is the way I feel about it. That is the picture of an old type—an old family doctor, right there (indicating), talking right to the women who drink in this kind of advertisement or any kind of advertisement. Of course, a woman is the one who would look at it, because it is herself that uses it.

Q. What impression would be conveyed to your mind by looking at the representations on the tin container, marked Commission's Exhibit No. 11?

A. I still get the impression that it was either a doctor who put it out or it was endorsed by a medical society, or else the "M. D." wouldn't be on there.

Q. I see. [53]

A. It looks to me as though it was put out by the Medical Society or a medical doctor.

Q. Doctor, will you look at some of these advertisements, these advertisements here (indicating)?

A. Yes; I want to read this first one right here. This is the one that forms my whole opinion, right there (indicating), that picture of that kind and "Your Doctor Will Tell You".

(Testimony of Francis J. O'Donnell.)

Q. All right. Just read it to yourself.

A. I still say that it is put out by a doctor or endorsed by the medical profession.

Q. Now, will you read one or two more, please, if you do not mind? Pick them out there and read any particular ones, and see if it changes your mind after reading the wording.

A. "Endorsed By Leading Physicians and Surgeons." "Approved By Physicians and Surgeons". Everything is physicians and surgeons on there, the whole setup. That is the way it strikes me, and then that "M. D.", too. I can't form any other opinion.

Q. All right, sir.

A. The whole thing is put out by the medical—what is the "M. D." on there for? That is what I would like to know, other than to create that impression.

Q. I don't know.

A. I don't, either. In fact, I never saw it before, but I was just wondering there what the "M. D." was on there [54] for, if it was not for that reason, to create that impression.

Q. Take a look at the exhibit marked Commission's Exhibit No. 13, read it, and tell us what you think about those.

A. Here is your nurse again, right here (indicating). Here is your doctor right here, again (indicating).

Q. Any change in your belief?

(Testimony of Francis J. O'Donnell.)

A. I am a registered druggist.

Q. You are a registered druggist?

A. Yes.

Q. You have been in the business as a druggist for 33 years?

A. Not as a druggist. No; I have been——

Q. I mean in the drug business.

A. I worked in a drug store, and I have been a druggist since 1920.

Q. That is 20 years.

A. Yes, sir, since 1920.

Q. As a druggist, you receive a great deal of advertising material, of course?

A. Yes, sir.

Q. And you read that advertising and generally get acquainted with it?

A. Some time; yes. [57]

Q. Are you easily fooled as to what an advertisement contains?

A. No, sir. I am ashamed of some of the advertisement that comes to my place. That is off the record. I didn't mean that——

Q. You are not misled by such advertising, are you? A. No.

Q. Now, do you handle the "M. D." products?

A. I have never seen them before in my life. I don't think it is sold in this part of the country.

Q. You know a good many doctors around the city? A. Quite a few; yes.

(Testimony of Francis J. O'Donnell.)

Q. You know there is a medical association here—a medical society? A. Yes.

Q. Do you know whether or not the medical society has placed its endorsement on any medicinal product?

A. I know they have not, but does the public know?

Q. You know that the medical society never endorses a product?

A. Yes. But does the public know that?

Q. Please don't ask me questions. I am asking them. A. All right.

Q. Now, with your knowledge that the Medical Society of the District of Columbia and elsewhere never endorses a [58] medical product or any other product, you look at those advertisements for the "M. D." products and you say that they indicate that the medical profession has endorsed them?

A. Yes.

Q. Why?

A. From the looks of the package, the looks of the advertising.

Q. But you told us, Doctor, that you know that the medical profession never endorse a product?

A. Yes; I know that.

Q. And yet you say——

A. But it is misleading, because it leads the public to believe it.

Q. I am talking about the fact that you are not misled. Are you? A. No, I am not.

(Testimony of Francis J. O'Donnell.)

Q. You can read these advertisements, and you know the minute you lay eyes on them——

A. Yes.

Q. ——that the Medical Society has never endorsed a product? A. Yes.

Q. You know that the medical profession as a whole has never endorsed products?

A. Yes. [59]

Q. You know that no reputable doctor signs his name and says, "That is a product which I endorse"? A. Yes.

Q. You know that? A. Yes.

Q. Then, you personally are not misled?

A. No, sir.

Q. You personally have been talking about what other people might do.

A. From the looks of that package right there——

Q. Just a minute, Doctor. My question is——

A. Yes.

Q. You are testifying not on behalf of yourself because you are not misled? A. Yes.

Q. You are telling the Commission that, in your opinion, other people are misled?

A. I am testifying——

Q. Let me finish my questions, please. You are testifying that you are not misled personally?

A. Yes.

Q. But that, in your opinion, other people are misled by the advertising of these products?

A. Yes.

(Testimony of Francis J. O'Donnell.)

Q. Is that right [60]

A. That is right. I am testifying from my experience in the drug business, the length of time I have been in that. The women tell me when they come in to buy these things, "It must be good; it is endorsed by doctors".

Q. But did you not say that you are not personally misled? A. No, I am not.

Q. You are telling the Commission that, in your opinion, other people might be misled, but that you are not; is that correct? A. That is right.

Q. All right. A. Yes.

Q. Then, when you personally look at this advertisement, you see the letters "M. D." and see the picture of a nurse and see the picture of a doctor, and you know perfectly well that it is not a member of the medical profession that has endorsed it; don't you?

A. I know perfectly well there should be an investigation of this advertisement——

Q. Please answer the question.

A. The way I feel about it.

Q. You know perfectly well, when you look at the letters "M. D.", and the picture of the nurse, that no medical association or doctor has ever endorsed that; don't you? A. Yes. [61]

Q. In your business as a druggist, do you handle douche powders? A. Yes, indeed.

Q. Do you handle Supercones?

A. No, sir.

Q. Do you know what Supercones are?

(Testimony of Francis J. O'Donnell.)

A. That is a trade name on it.

Q. Do you know what they are, actually?

A. It is a contraceptive. It is a suppository; isn't it?

Q. Do you know how it operates, how it works?

A. No; I never read it.

Q. You have never seen them?

A. I have never seen them before; never seen this package before. I came down here.

Q. I understood you to say that many men came into your store, on instructions from their wives, to buy contraceptives of one kind or another; is that right?

A. We were talking about powder then, weren't we?

Q. Well, make it powder. A. No—yes, sir.

Q. One final question: As you look at the advertising on this Exhibit No. 12, the large one, and on 13 and 14, those pages you have before you—when you look at those exhibits and read the material, you know that has not been endorsed by the medical profession? [62]

A. Which pages are they?

Q. This large exhibit.

A. This one here (indicating)?

Q. When you read those advertisements in Exhibit No. 12, you know perfectly well that the medical profession never endorsed any one of those; don't you? A. I do; yes, sir.

(Testimony of Francis J. O'Donnell.)

Redirect Examination

By Mr. Bellinger:

Q. Doctor, you know from your experience, don't you, and your contacts with your customers, what remarks they make about such advertising?

A. Yes; I hear them every day.

Q. And you have testified from those facts, have you not?

A. Yes. That is how I make that remark.

Mr. Bellinger: That is all.

The Witness: That it was from my experience, more than from my feeling towards the advertisement. [63]

ROBERT ERNEST TAYLOR

was called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Bellinger: [64]

Q. Mr. Taylor, what is your full name?

A. Robert Ernest Taylor.

Q. And what is your address?

A. 1718-17th Street, Northwest.—

Q. Washington? A. Washington; yes.

Q. What is your business; what work are you engaged in? A. Driver-salesman.

Q. For the Coca-Cola Company, I judge?

A. Yes.

Q. How long have you been so engaged?

(Testimony of Robert Ernest Taylor.)

A. About three years and a half.

Q. Where were you prior to that?

A. Raleigh, North Carolina.

Q. Mr. Taylor, I am going to show you Commission's Exhibit No. 12. I will ask you to look at it and read it, and then, if you will, tell us what impression that advertisement conveys to your mind with respect to the products advertised.

A. If you mean the product, the advertisement conveys to me is a product that is approved by the leading profession—medical profession, just to look at the advertisement and the trade mark here.

Q. Have you read some of it?

A. Yes; I have read some of it.

Q. And is there anything, after reading it, that changes [65] your mind about that?

A. Yes; there is—the advertisement, I don't think it is a product that should be advertised.

Q. No, I don't mean that. I mean, after reading the advertisement, do you think the same way about it. Do you say that when you look at it you get the impression that it is endorsed by the medical profession or fraternity. Well, after reading it do you get any different impression, or do you still think the same way about it?

A. You mean, in my mind, do I think——

Q. Yes.

A. No. After reading the advertisement, just glancing at it, you would think it would be endorsed by the medical profession, but after reading it, I

(Testimony of Robert Ernest Taylor.)

don't think it would be endorsed by the medical profession.

Q. You mean to say that after you read the full advertisement you changed your mind about it, or that there was something in there to change your impression that you first got, or would you still think that it was endorsed by the medical profession?

Mr. Hayden: He has answered that, I submit Mr. Examiner. He says that after reading it he changed his mind, he did not think it was approved.

Mr. Bellinger: No; I think he is somewhat confused, Mr. Hayden. He seems to be a little confused. I [66] evidently do not make myself quite clear to him, for some reason.

By Mr. Bellinger:

Q. Mr. Taylor, what is there on there that makes you think it was endorsed—the products were endorsed by the medical profession?

A. Well, the cross and the "M. D." and the nurse; that is all.

Q. All right. After you have read that, is there anything in the printing that changes that impression?

Mr. Hayden: Just a minute, please. I submit that the question is improper, because it leads to an answer. He says: Is there anything in it that leads to a different conclusion? That is not a direct question. It is a leading question.

Trial Examiner Reeves: The question is leading.

(Testimony of Robert Ernest Taylor.)

Mr. Hayden: And I submit he has answered the original question.

By Mr. Bellinger:

Q. Does reading the ad change your impression?

A. Not as far as—if you read the ad you would still think it was approved by the medical profession.

Mr. Bellinger: That is all. I have no further questions.

Mr. Hayden: Mr. Reporter, will you go back to the [67] question that Mr. Bellinger asked, about the second or third, where he asked the first time, “After reading it, does it change your mind?” and the answer was that he did change his mind? Would you mind reading that question and answer back?

(The reporter thereupon read as follows:

“Q. No, I don’t mean that. I mean, after reading the advertisement, do you think the same way about it? Do you say that when you look at it you get the impression that it is endorsed by the medical profession or fraternity? Well, after reading it do you get any different impression, or do you still think the same way about it?

“A. You mean, in my mind, do I think——

“Q. Yes.

“A. No. After reading the advertisement, just glancing at it, you would think it would be endorsed by the medical profession, but after reading it, I don’t think it would be endorsed by the medical profession.”)

(Testimony of Robert Ernest Taylor.)

Mr. Bellinger: It shows clearly that he was confused by my question.

Cross Examination

By Mr. Hayden:

Q. Are you married, Mr. Taylor?

A. No, sir.

Q. What is your age? [68] A. 29.

Q. Do you know what these products are that you see in that advertisement?

A. Well, from what I read, they are some kind of—that is a douche powder.

Q. Do you know what a douche powder is?

A. No, I do not. I have an idea what it is.

Q. Well, what is it?

A. It is a powder women use sometimes in having intercourse with men. That is my impression of it.

Q. Do you know what they use it for?

A. To keep from having children, I suppose.

Q. Did you ever see that advertisement before this morning? A. No; I can't say I have.

Q. Have you been visited by a member of the Federal Trade Commission staff in the last couple of years? A. No, sir.

Q. When did you first know that you were going to be called as a witness this morning?

A. Just 10 minutes before 12 o'clock.

Q. And you never talked with any representative of the Commission before? A. No.

Q. When you talked to Mr. Bellinger, this gentleman on my right, this morning, did he call

(Testimony of Robert Ernest Taylor.)

your attention to those [69] letters "M. D." in the advertising? A. No, sir.

Q. What did he say to you about that advertising?

A. He asked me what I would get—what impression I would get by reading this advertisement.

Q. And what did you say?

A. I told him just what I told you a while ago.

Q. Which was——

A. By looking at the advertisement, the pictures on it, you would think it was approved by the medical profession.

Q. Now, why did you think it was approved by the medical profession because of these pictures?

A. Well, it has doctors and nurses.

Q. Did you ever see doctors and nurses on anything else?

A. Oh, yes; on a lot of drugs and different things.

Q. And does that mean that every one of those has been approved by the medical profession?

A. Well, I never gave it much thought.

Q. Did you ever read any ads for douche powder before? A. No, sir, I have not.

Q. How far did you go in school?

A. I got through first year high school.

Q. And do you think of a doctor every time you see the letters "M. D." anywhere?

A. Well, most of the time; yes, sir. [70]

Q. Can you see the letters "M. D." and think of anything else besides a doctor?

(Testimony of Robert Ernest Taylor.)

A. "M. D."?

Q. "M. D." A. Maryland.

Q. What is the difference between an "M. D." for a doctor and an "MD" for Maryland?

A. Well, most of the time it is—the "MD" is used after Maryland sometimes, to show it is for Maryland—an abbreviation.

Q. If you saw those two letters painted on the street, what would they suggest to you?

A. Just painted on the street, it wouldn't suggest anything in particular.

Q. If you saw them painted on a wall, what would they suggest to you?

A. Just plain on the wall?

Q. Yes.

A. Wouldn't suggest anything in particular, unless I thought of Maryland or some medical doctor, or something like that.

Q. If you saw those two letters on a piece of paper, if you wrote them yourself, "MD," what would they suggest to you?

A. What would they suggest? [71]

Q. Yes. Suppose I wrote those two letters "MD", on a piece of paper, and you looked at it, what would they suggest to you?

A. Well, it would suggest—well, it always comes to me "medical doctor" when I see "M. D.", maybe, most of the time.

Q. Does it make any difference how the "MD" is written or spelled? If you were writing John Jones—by the way, what does "MD" stand for.

(Testimony of Robert Ernest Taylor.)

A. What does "MD" stand for?

Q. Yes.

A. Well, in a lot of cases it stands for a medical doctor.

Q. Did you ever see a man's name "John Jones, M. D."?

A. "M. D."?

Q. Yes.

A. No. I seen a lot of other peoples' names, "M. D." after them, but I never saw John Jones.

Q. Very good. Now, what doctor do you know that uses the letters "M. D." after his name?

A. I don't know any doctors in this town. I never go to doctors. [72]

Redirect Examination

By Mr. Bellinger:

Q. As a matter of fact, Mr. Taylor, do you or do you not still say that from reading the advertisement you get the impression that the product was endorsed by the medical profession?

A. Yes; it does.

Recross Examination

By Mr. Hayden:

Q. What do you mean by "endorsed", Mr. Taylor?

A. "Endorsed"?

Q. Yes.

A. That it has been approved by the medical profession. [76]

PAUL SAMUEL CURRIN

was called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Bellinger:

Q. Mr. Currin, what is your full name, please?

A. Paul Samuel Currin.

Q. What is your address?

A. Home address is 295 Upton Street, Northwest.

Q. What is your business address?

A. 2017 Virginia Avenue, Northwest.

Q. Both in Washington, D. C.?

A. That is right.

Q. What is your business?

A. Sales manager, Logan Motor Company.

Q. How long have you been with them?

A. Just about four years.

Q. Prior to that, did you live in Washington?

A. Yes, sir. [79]

Q. Mr. Currin, I want to show you what is marked as Commission's Exhibit No. 12 in this case, which is an advertising sheet or folder, and ask you to look at it, please, and tell us what impression it conveys to your mind with respect to the products advertised.

A. Well, first, "M.D."—doctor—"M.D.", that stands for doctor. The name itself would more or less make me think it was approved by a doctor, and this cross, with the nurse on it, just looking at it, not reading it through, several places in here it says "approved by doctors and surgeons".

(Testimony of Paul Samuel Currin.)

Q. And you get what impression, then, about those products?

A. That they are *improved* by the medical society or doctors and professional surgeons.

Q. What gives you that impression?

A. Well, the "M.D.", with the cross and nurse on it, would give me a better impression than any other thing on here.

Q. And the name?

A. Yes; "M. D.", the name.

Mr. Hayden: What name?

The Witness: "M.D."—the name or initial.

By Mr. Bellinger:

Q. Have you read some of the ads?

A. Yes; I have read several of them here.

Q. After reading them, do they change that impression as you arrived at it? [80]

A. No; it does not change mine, because the majority of them it is approved by them.

Q. Then, I will ask you, Mr. Currin, to look at this sheet, marked Commission's Exhibit No. 13, and tell us what impression those ads convey to your mind in respect to the products?

A. Well, it would be the same thing in my mind—the picture of this nurse, and it says here still "approved by medical society".

Q. All right, sir. What does this one, which is marked Exhibit No. 14, convey to you?

A. Well, I don't see where the picture, one of the pictures, would make me think so, but it says

(Testimony of Paul Samuel Currin.)

“approved by doctors and surgeons”—“physicians and surgeons”.

Q. What about this picture (indicating)?

A. Well, that picture—I was speaking of these two up here. As I told you before, the “M. D.”, with the cross and nurse on it, makes me think that is approved by the medical society or doctors.

Q. All right, I will ask you to look at this box or can, marked Commission’s Exhibit No. 11, which is labeled “M. D. Medicated Douche Powder”, and ask you what impression that gives to your mind when you see it.

A. It gives me the same thing—“M. D.”, doctor, and the cross and nurse, would give me the same impression.

Mr. Bellinger: You may cross examine. [81]

Cross Examination

By Mr. Hayden:

Q. Mr. Currin, what is your age?

A. My age is 25.

Q. 25? A. Yes, sir.

Q. Are you married? A. No, sir.

Q. Did you ever see that advertisement before today?

A. Before today, this year (indicating)?

Q. Yes.

A. Well, I couldn’t say exactly. I don’t believe I have. I may have two years ago when this *following* to me. He may have had the same thing, but I wouldn’t say yes or no, because I couldn’t remember two years ago.

(Testimony of Paul Samuel Currin.)

Q. By this "this fellow", do you mean——

A. Whoever it was talking. I remember talking to somebody about it.

Q. This was Mr. Bellinger, two years ago?

A. I couldn't remember: I told him the other day I couldn't remember.

Q. Where were you talking to him?

A. At 1111 - 18th Street.

Q. Did he come into your place there?

A. No, sir; it was at 18th and M. I was out on the used [82] car lot at the time.

Q. What did he bring in to you?

A. If I am not mistaken, he had some paper.

Q. Tissue paper?

A. I believe it was some kind of paper—toilet paper or tissue paper.

Q. Was it in a book?

A. He had it in a case. I wouldn't say it was in a book.

Q. And you can not remember the man's name?

A. No, sir, I can not.

Q. He showed you some paper?

A. He showed me several different things.

Q. What was on the paper?

A. I don't remember.

Q. Was it "M. D." on the paper?

A. I couldn't say definitely. I don't remember.

Q. Was it toilet paper or tissue paper?

A. It was some kind of toilet paper, as I remember.

Q. What did he ask you?

(Testimony of Paul Samuel Currin.)

A. He asked me if I approved of it, and did I like it, and I said as far as I knew, it was all right. I didn't know anything about it. I found it was—I remember looking at the thing, and I was talking to him, and he explained a little more about it. Then I said, "I think you must have the wrong people," and then he explained to me about the situation. [83]

Q. What did he say about the paper that he showed you?

A. He asked me if I approved of it, whatever it was he had, and didn't I think it was a good thing.

Q. What did you say to that?

A. I said, as far as I knew, it was.

Q. Were the letters "M. D." on the paper he showed you? A. I don't remember.

Q. Now, when you came in here in response to a subpoena, you talked to Mr. Bellinger about the advertisements? A. Yes.

Q. What did Mr. Bellinger say to you about the advertisements?

A. You mean when we were out there?

Q. Yes.

A. He asked me to look at it and read it and look at the pictures and form my own opinion of it, not somebody else's.

Q. Did he call your attention to those letters, "M. D."?

A. Well, he told me to look at the letters on the box and read them and read the whole thing.

Q. And after you had looked at it, what did you say?

(Testimony of Paul Samuel Currin.)

A. He asked me what my impression of it was, and what I think, and I told him.

Q. What did you tell him?

A. I told him, just looking at it and seeing "M. D." on it, and the picture of the red cross and the nurse, naturally [84] you would think it was approved by doctors.

Q. Is any doctor's name signed to any of those papers? A. No.

Q. You spoke of it being approved by a medical society. What do you mean by that?

A. Well, I don't mean medical society; I mean just doctors, whether a medical society or not, just by looking at the "M. D."

Q. But you said "medical society". What did you have in mind?

A. I meant doctors as a whole.

Q. You meant all doctors?

A. Not every one individually, but I mean looking——

Q. Please answer my question. Do you mean that certain doctors had approved it? A. No, sir.

Q. What did you mean?

A. Well, I said it was approved by doctors. I remember saying "medical society", but I don't know.

Q. You said "medical society". What did you mean when you said "approved by doctors"? Did you mean one doctor, a million doctors or a thousand doctors, or how many?

A. Not many particular numbers.

Q. Which doctors did you have in mind—doctors

(Testimony of Paul Samuel Currin.)

in the District of Columbia or in Chicago—— [85]

A. I don't say any doctors anywhere.

Q. I am trying to get at what you had in mind, Mr. Currin. You said it looked to you as though that product had been approved by doctors. Now, what doctors?

A. Well, no particular doctor, I am telling you. I said nothing there tells you it has been approved by doctors, but just looking offhand at it, looking at the picture and the "M.D." on there——

Q. It looks as though it has been approved by doctors?

A. I didn't say it had been. I said, from the looks of the thing, "M. D." on it, you would naturally think offhand it had been approved.

Q. By doctors? A. Yes.

Q. By how many doctors; by any class of doctors?

A. No; by not any particular number of a class, either one, here.

Q. If I told you that that product had been approved by one doctor, would that be a natural thing for you to believe, looking at the product?

A. It would be a natural thing for me to believe if you told me it was approved by one doctor. I am just going by the picture and the letters.

Q. Does that picture convey to you that the doctors had approved it? [86] A. No, sir.

Q. Does it convey to you that all doctors in the District of Columbia had approved it?

A. No, sir.

(Testimony of Paul Samuel Currin.)

Q. Does it convey to you that the doctors in a particular section of the city——

A. I said the “M. D.” on there, the picture of the nurse, the red cross—looking at it offhand, you would think it was approved by doctors.

Q. By a doctor? A. By doctors.

Q. By doctors? A. Yes.

Q. You have no idea of how many you have in mind? A. That is right.

Q. When you said “approved by medical society,” what did you mean by that?

A. Well, I didn’t——

Q. Where did you get that idea?

A. I don’t know.

Q. What is a medical society?

A. I guess it is the doctors.

Q. Well, did you discuss “medical society” with Mr. Bellinger? A. No. [87]

Q. What do you mean by “medical society”?

A. Well, I was speaking of any medical society; I mean a group of doctors, or something of that sort.

Q. A group of doctors? A. Yes, sir.

Q. Is there a medical society in the District of Columbia? A. I don’t know.

Q. You don’t know? A. No.

Q. Did you get the impression that this product was approved by the Medical Society of the District of Columbia? A. No.

Q. You did not get that? A. No.

(Testimony of Paul Samuel Currin.)

Q. Now, why do those letters "M. D.", suggest a doctor to you?

A. Just naturally, "M. D." is doctors. All I ever saw said "M. D." on it.

Q. Did you ever see a doctor's sign with the letters "M. D." on it? A. With "M. D."?

Q. Yes.

A. On all the prescriptions and things, they put "M. D." on them.

Q. No. Have you ever seen a doctor's sign, or when you [88] look in the *directly*, or what not, do you ever see a doctor's name with "M. D."?

A. Write the name out and "M. D." at the end of it?

Q. Yes. A. Yes, sir.

Q. Did you ever see that? A. Yes.

Q. Is is written out exactly there like the "M. D." you have seen with a doctor's name?

A. I don't know if it is exactly like that, but I have seen them at the end of a doctor's name.

Q. Do the letters "M. D." that you see at the end of a doctor's name correspond exactly with these letters as they are there?

A. It has the period between them.

Q. Where?

A. I mean on most of them that I looked at.

Q. Where was the period?

A. In between the "M" and "D".

Q. Just one period between the "M" and "D"?

A. Yes.

Q. You never saw the period before the "M"

(Testimony of Paul Samuel Currin.)

and after the "D"? A. I don't know exactly.

Q. Do you know what that period stands for, that you have [89] seen? A. No.

Q. Why do you associate the letters "M. D." with a doctor? What does that mean?

A. Well, in my mind "M. D."—it meant—he asked me for my own personal opinion, and that is what I told him.

Q. I am asking what it means there to you; what do the letters "M. D." stand for?

A. Medical doctor.

Q. And they are written "M" dot, "D"; is that right?

A. Yes. They are always written like that.

Q. Did you ever see the letters "M. D." without thinking of a doctor?

A. I guess I have. I don't remember. I don't recall exactly.

Q. Did you ever see any peoples' initials "M. D." A. Yes.

Q. Then, the letters "M. D.", do not always mean a doctor; do they? A. Not always. [90]

Mr. Bellinger: Your Honor, I now propose to read into the record this definition of "M. D.", taken from page 2995 of Webster's New International Dictionary, Second Edition, Unabridged.

Trial Examiner Reeves: You may proceed. [96]

Mr. Bellinger: It is as follows:

"M. D. *Medicinae Doctor* (L. Doctor of Medicine); Middle Dutch; *maindroite* (Fr., right hand). (Mus.)". [97]

MAURICE EUGENE BACHMAN

was thereupon called as a witness on behalf of the Respondent, and, having been first duly sworn, testified as follows: [99]

Direct Examination

By Mr. Cohn:

Q. Your full name is Maurice Eugene Bachman? A. Yes, sir.

Q. And where do you reside, Doctor?

A. 16647 Parkside.

Q. That is in the City of Detroit?

A. City of Detroit.

Q. What is your office address?

A. 569 Fisher Building.

Q. That is also in the City of Detroit?

A. City of Detroit.

Q. What degrees do you have, Doctor, from universities or colleges?

A. Bachelor of Science in Medicine, and Doctor of Medicine.

Q. From what university?

A. University of Michigan. I received my Bachelor of Science Degree in 1923 and my Doctor of Medicine Degree in 1925.

Q. You are at the present time a practicing and licensed physician? A. I am.

Q. And how long have you been practicing, Doctor? A. Since 1926. [100]

Q. You have been in practice continually since that time?

(Testimony of Maurice Eugene Bachman.)

A. Except for some post graduate work that made me upset my practice.

Q. What post graduate work have you had?

A. Three years post graduate work in obstetrics and gynecology.

Q. And where was it taken?

A. Assistant to Dr. Kirschbaum, Lying-In Hospital, Chicago, and Chicago Post Graduate School, and Wayne University.

Q. What medical societies are you a member of?

A. Wayne County Medical Society, Michigan Medical Society, and American Medical Association.

Q. Do you specialize in any particular branch of medicine?

A. Yes, I do. Obstetrics and gynecology.

Q. And your specialized work and training has been along those lines? A. Yes.

Q. Are you familiar with the drug product known as M. D. Douche Powder? A. I am.

Q. Do you know the formula for that product, Doctor? A. Yes, I do.

Q. Will you state that formula? [101]

A. Alum, fifteen drams; zinc sulphate, six drams; boric acid powder, twelve ounces; oxyquinolin sulphate, one dram; oil white thyme, five drops; oil of peppermint, one and one-half drams; phenol, two drams, and eucalyptol, three minims. That makes up 16 ounces.

Q. 16 ounces? A. Yes.

(Testimony of Maurice Eugene Bachman.)

Mr. Bellinger: Doctor, if you will pardon me, and give me that list of ingredients again, please.

Trial Examiner Reeves: Off the record.

(A discussion ensued off the record.)

By Mr. Cohn:

Q. Do you know the characteristics and qualities of each of these ingredients? A. I do.

Q. Will you tell us what they are?

A. The first one, alum, is an astringent; zinc sulphate is mildly antiseptic; boric acid powder is mildly antiseptic; oxyquinolin sulphate is germicidal; oil of white thyme is flavoring; oil of peppermint is flavoring; phenol is germicidal; and eucalyptol is a deodorant.

Q. Having in mind the formula you have stated and the characteristics and qualities of these ingredients, will you tell us what, in your opinion, the value of this powder is as a germicide? [102]

A. Well, it is cleansing, antiseptic, and germicidal, mildly germicidal.

Q. And what value, in your opinion, Doctor, does this powder have as antiseptic?

A. It is definitely antiseptic.

Q. What effect, Doctor, in your opinion, would this powder have on bacteria?

A. Well, it has a tendency to prevent the growth of certain bacteria, and it will kill certain bacteria, too.

Q. Would you care to compare it with other germicides as a destroyer of bacteria?

(Testimony of Maurice Eugene Bachman.)

Mr. Bellinger: I don't think that would be a competent comparison. I think the witness can tell what it will do. He can give his opinion as to how effective it may be, or what the therapeutic value is, but I don't know that a comparison with any other product——

Trial Examiner Reeves: Will the reporter read the question back?

(The question was read.)

Mr. Bellinger: It was my thought that there were probably other products on the market more familiarly known.

Trial Examiner Reeves: I think if you would have the witness describe the use and effect of this remedy and then he might state, if he cares to do so, [103] what competing remedies or preparations there are.

By Mr. Cohn:

Q. I believe you have testified, Doctor, that this preparation is mildly germicidal?

A. Mildly germicidal, and definitely antiseptic.

Q. Have you ever prescribed this powder to any of your patients? A. Yes, I have.

Q. To what extent have you prescribed it?

A. Quite a bit.

Q. Do you know what the results have been from the use of this powder? A. I do.

Q. Will you state that, please?

A. They were satisfactory. You just asked me a little while ago on the action of it. Would you

(Testimony of Maurice Eugene Bachman.)

want me to answer that? I was asked about the action of the thing, how the thing works. Was that what you wanted me to tell?

Q. We will cover that later. Now, Doctor, will you describe the effect of this powder as a germicide?

A. Well, this is a douche powder, used for douches in women, and the reason that this powder is antiseptic and germicidal for women is because it has a P. H. value of 4 or less, which means that this is an acidifying preparation. A teaspoonful of this in a pint of water dissolved [104] will act as an acidifier for the vagina.

Now, the normal vagina is acid and no harmful bacteria will grow in an acid medium in the vagina, but if the vagina is alkaline or subjected to alkaline douches, pathogenic bacteria will grow in the vagina, producing discharges known as leukorrhea and erosions. Now, experimental work was done by Dr. Karnaky of Houston, Texas, who is one of the outstanding gynecologists in the country, with acidifying tablets in the vagina, and he has shown that if tablets or a douche——

Mr. Bellinger: I object to the witness relating something that somebody else has done unless he knows of his own knowledge the details that he can give us.

Trial Examiner Reeves: It might be that the doctor is quoting from medical literature. If that is true, he has a right to do it.

Mr. Bellinger: Well, if it is knowledge on his

(Testimony of Maurice Eugene Bachman.)

part rather than hearsay—if he is willing to swear as of his own knowledge to certain things, why, we have no objection.

Mr. Cohn: I can't see any objections to quoting recognized medical authorities, and the conclusions reached by those authorities on the basis of prolonged and thorough research. I don't think Dr. Bachman is finished, but I think if you do allow him to continue—— [105]

Trial Examiner Reeves: I think I will overrule the objection.

A. (Cont'd.): Dr. Karnaky has published, through the Year Book of Gynecology and Obstetrics, which is published every year in Chicago, for the years 1936, 1937, 1938, and 1939, on these researches, which he has done, and which we have been able to confirm here in Detroit in our own practice, that an acidifying douche will both prevent the growth of bacteria and will prevent the formation in one-third of the patients of erosion of the cervix; that the treatment that he has used was either a boric acid acidifying tablet or a vinegar douche, whose P. H. value was around 4, or lower.

Mr. Bellinger: Doctor, excuse me for interrupting you now and then, but I want to get the full facts and, as a layman, I don't understand some of these terms, and I am sure the Trade Commission doesn't either.

Now, what do you mean by P. H. value?

The Witness: That is the alkali acid ration of

(Testimony of Maurice Eugene Bachman.)

the preparation or of the substances used. P. H. 3 is definitely acid, while P. H. 7 is definitely alkaline. That is, the alkalinity and acidity of any preparation is judged by the P. H. value, or when you speak of a P. H. 4, it means that the acidity is 4, according to certain standards that we are discussing here. [106]

Mr. Bellinger: I see. Thank you.

The Witness: Now, this preparation was used on my patients after I found that it had an acidifying P. H. value of 4 or lower, and after equally good uniform results as had been produced with any other acidifying preparation. I was able to clear up a discharge and to prevent, in some of these patients, the formation of erosion. The reason I used this douche was because prior to that we had no conception until this was brought out that it made much difference what you used in a douche, and, of course, most of the recommendations were the use of baking soda douches and after it was shown experimentally that these douches had a tendency to reduce the glycogen content in the cervix, thus producing an erosion. Today it is the best knowledge to use a glycogen medium in the cervix and to prohibit the pathogenic germs from growth. By Mr. Cohn:

Q. It is your opinion, then, Doctor, that an important factor in a good douche powder is that it be an acidifying solution; is that correct?

A. That is correct.

(Testimony of Maurice Eugene Bachman.)

Q. Will you tell us whether, in your opinion, the M. D. Douche Powder contains this characteristic?

A. Yes, it does. [107]

Q. On what do you base your opinion?

A. I had laboratory tests made by the Charlton Laboratory chemists. They reported to me the P. H. reaction of one teaspoon per pint as 3.9.

Q. What does that indicate, Doctor?

A. That it is an acidifying mixture. That as a douche, it would be acid. And, therefore, it is an antiseptic, as far as vaginal douches are concerned. Also, the antiseptic test was done by the chemists, and they showed that staphylococcus aureus would not grow in M. D. douche solution.

Q. That is a form of bacteria?

A. Yes, sir.

Q. What do you prescribe today as a douche, Doctor?

A. I vary. Most favorite is the cheapest—vinegar and water, but I also prescribe this preparation, because it has a very fine deodorant powder.

Q. You have told us, Doctor, that you have prescribed M. D. Powder as a douche powder to your patients on numerous occasions; is that correct?

A. Yes.

Q. Have any of your patents ever raised the question as to the meaning of the letters "M. D." on this product?

A. No.

Mr. Bellinger: We object to that. [108]

Trial Examiner Reeves: Objection overruled.

(Testimony of Maurice Eugene Bachman.)

By Mr. Cohn:

Q. The question, Doctor, that I will ask you is: Have any of your patients ever raised the question as to the meaning of the letters "M. D."?

A. No.

Q. What effect, if any, Doctor, would you say there would be on the tissue from the use of this M. D. Powder?

A. It is not injurious to tissues.

Q. And, in your opinion, is this powder safe, dependable, and efficient? A. I believe so.

Q. And on what do you base that answer, Doctor?

A. Well, the fact that I have used similar powders of the same preparation. We have used these things in school since school days, and have never found any irritation to the tissue. We find definite antiseptic value and, being an acidifier, I believe is germicidal and antiseptic to the vaginal flora.

Mr. Bellinger: Off the record.

Trial Examiner Reeves: Off the record.

(Discussion ensued off the record.)

By Mr. Cohn:

Q. In your opinion, Doctor, does the trade name or trade letters "M. D." on this product imply or infer that it is a [109] preparation of medical doctors?

Mr. Bellinger: Now, I think that question is certainly objectionable, Your Honor, and I object

(Testimony of Maurice Eugene Bachman.)

to it. I think that is a matter for the Commission to decide, and the only thing the witness may testify to is as to whether or not it misleads him.

By Mr. Cohn:

Q. Well, I mean the question that way. That is my intention, as to whether or not it leads him to believe, whether the letters to him mean that it is a preparation of medical doctors.

Trial Examiner Reeves: The witness may state what significance the letters have to him.

By Mr. Cohn:

Q. That is all I intended by this question.

A. Well, it says, "Medicated Douche Powders." That is what it is supposed to stand for. The meaning behind it, I can't tell you. To me it means what it says on it, a medicated douche powder. Naturally, the first thing "M. D." brings to my mind is, being a doctor myself, it means "doctor", but it is self-explanatory, when it says: "Medicated douche."

Q. You have no financial interest in the Stanley Laboratories? A. None whatever. [110]

Q. You have no financial interest in the outcome of this hearing, either directly or indirectly?

A. None whatever.

Q. You are testifying here today, to the best of your knowledge and to those matters that you know about in connection with this preparation; is that right?

A. I am. It is my own original formula.

Q. You say this is your own original formula?

(Testimony of Maurice Eugene Bachman.)

A. The origin to this formula was given to us in the senior year in class, without oxyquinolin sulphate, as a douche powder, which, as the professor at that time put it, would be very helpful in the practice of medicine, and I originally wrote this prescription for my brother's wife who had a discharge, and he wrote to me and asked me what to do about it. Since that time he had it added, added oxyquinolin sulphate to it, and prepared this powder himself. After preparing it, he sent me a sample of it, several samples, as a mater of fact, and I was able to use it here on several patients, and felt that the results were uniformly satisfactory, so I encouraged that patients use this particular preparation.

Q. Now, what particular properties does this oxyquinolin sulphate have?

A. It is a germicide and spermatozoicide. I particularly recommend this powder in cases where people use diaphragms [111] and jellies, because a lot of these jellies and the things that they use are alkaline, and if you don't use an acidifying douche, you may get into trouble. You may have irritation, discharge, and erosions of the cervix.

Q. Where did you say you first obtained this formula?

A. From the professor of obstetrics and gynecology when I was a student at Michigan University.

Mr. Cohn: That is all.

(Testimony of Maurice Eugene Bachman.)

Cross Examination

By Mr. Bellinger:

Q. That was how many years ago?

A. 1924.

Q. Fifteen or sixteen years ago?

A. That is true.

Q. I believe you said, Doctor, that you received your Bachelor of Science Degree in 1923.

A. That is true.

Q. And you completed your medical education in two years? A. 1925.

Q. Was that a regular two-year course, Doctor?

A. No. That is a combination degree—you spent—first you had to get in some “Lit” and then you get your Doctor of Medicine Degree.

Q. And all that was in the University of Michigan? A. Yes, sir. [112]

Q. Did you say that oxyquinolin sulphate was the only ingredient added to this formula after you first had it? A. That is true.

Q. And that was added by Mr. Bachman in Portland, Oregon? A. That is true.

Q. About how long has that been included in the formula?

A. It is rather recent. I did not use this powder except probably four or five years ago I started using it, so I don't know when it actually was put out. I know that the original prescription was sent to him around 1926 for the douche powder for his own wife, and the next thing I heard of it was when

(Testimony of Maurice Eugene Bachman.)

he sent me it in a box with the powder, and that was about 1935 or 1936, I believe that was the date. So I don't know when he added that to it.

Q. In 1935 or 1936, when you got some of it, it had oxyquinolin sulphate in it them?

A. That is right.

Q. You are the brother, are you not, of Mr. Bachman, who is one of the Respondents in this case?

A. I am his older brother.

Q. And he is the owner of the Stanley Laboratories?

A. I don't really know who the owner is. I never kept track of it.

Q. He is the proprietor?

A. I don't know that. I mean, I know that he has some- [113] thing to do with it, but I don't know who owns it.

Q. You know that is a business he is engaged in?

A. All I know is that the laboratories are named after his son, who is Stanley, and that is all. What their ownership is, I don't know.

Q. But you do know that he is charged as a Respondent in this case?

A. Yes, I do.

Q. And you have had correspondence with him and, perhaps, his counsel, relative to this case since it was started?

A. I have, naturally. That is true.

Q. He is not a physician, is he?

A. No; he is a pharmacist.

Q. He is a licensed graduated pharmacist, is he?

A. Yes, sure.

(Testimony of Maurice Eugene Bachman.)

Q. Is he a chemist?

A. Well, I don't know much of a distinction between a chemist and a pharmacist. I don't know what is required of them. I imagine that most pharmacists are chemists, in a way.

Q. You answer that question by reason of the fact that you know, do you not, Doctor, that a graduated pharmacist has been required to study chemistry?

A. That is right.

Q. Well, you would not say that this preparation is anything [114] but a douche, would you?

A. That is the only thing I use it for. I feel that it is very beneficial as a douche. I have not used it for anything else.

Q. Now, Doctor, is it necessary, in prescribing a douche for a patient, to first diagnose that patient's trouble? In other words, is it possible that a patient undergoing certain conditions would require one sort of a douche, and maybe another sort of a douche would not be desirable for that patient, but would be good for somebody else?

A. Well, I don't believe that douches are necessary for any normal individual. But, nature acts as a douche by providing certain secretions in the vagina which are acid secretions or lactic acid.

Q. So that a normally healthy woman does not need any douche?

A. A normally healthy woman does not need any douche at all.

Q. Then, if she needs a douche, there is some condition there that requires attention?

(Testimony of Maurice Eugene Bachman.)

A. If she needs a douche, the douche that she needs is an acidifying douche. She can use lactic acid or she can use vinegar or this preparation or Lauri puts out a preparation similar to this, or any of those douches which are definitely acidifying and will produce a P. H. value in [115] the vagina around 4 to 5, is a douche that is recommended. The alkali douches, or douches that people have been using, as a rule, because of ignorance, and even prescribed by physicians for the same reason, because of ignorance, are detrimental to the patient, and will not only not stop the growth of bacteria, but will aid the growth of bacteria, while any acidifying douche will prevent the growth of bacteria, and will increase the glycogen content in the cervix, and prevent these erosions that women come into the office with so often.

Q. The purpose of a douche is largely for cleansing and medication in the form of a destroying bacteria, isn't it?

A. The douche is cleansing, and it should be antiseptic.

Q. What is the distinction, Doctor, between a germicide and an antiseptic?

A. An antiseptic is a preparation which will control or prevent, rather, the growth of bacteria, and a germicide is a preparation which, when the germ comes in contact with it, will be destroyed. The standard that is used, that an antiseptic can be proven to be an antiseptic is if it destroys the

(Testimony of Maurice Eugene Bachman.)

staphylococcus aureus and a germicide should be able to destroy any bacteria.

Q. In other words, a germicide is more powerful than an antiseptic? [116]

A. Not necessarily. A germicide is more powerful only in the sense that it will kill all bacteria, while an antiseptic may prevent many forms of a certain germ which may be prevented by antiseptis, and a germicide will kill anything it comes in contact with.

Q. Well, now, Doctor, you testified on direct examination, I believe, that these letters "M. D.", in connection with this preparation, were not misleading to you. With your experience as a physician, do you think it would be possible for any such name on any preparation to mislead you? Doctor, before you used it, or prescribed it, you would know what was in it, wouldn't you?

A. You mean would I use something before I knew what was in it; is that it?

Q. Yes, or prescribe it.

A. No, I would not prescribe anything if I did not know what it was before I prescribed it.

Q. You know, as a matter of fact, don't you, Doctor, that medical societies or the medical profession does not, as a body, endorse or sponsor or put on the market any preparations, don't you?

A. It is true, except the American Medical Association.

Q. So that it would not mislead you, with your

(Testimony of Maurice Eugene Bachman.)

intelligence and training and profession back of you?

A. Well, I know that as far as I am concerned, that what [117] this thing stands for is just what it says on it, because it is written right on there to tell me.

Q. And another reason why it could not mislead you is because you are practically the originator of the formula?

A. I am not. The originator may have been 50 or 75 years before me. It was simply given to us in a lecture by the professor at that particular time when we were studying it in school.

Q. So that you knew what was in it when you got it from the professor, didn't you?

A. Yes, I had some idea.

Q. And you are the originator of it, in so far as your brother's use of it is concerned?

A. Well, I got the prescription. Of course, every druggist—every druggist in town has prescriptions from me that they could do the same thing with.

Q. Now, you said that none of your patients have ever raised the question as to its name. Is it customary for your patients to enter into arguments or raise questions with you about prescriptions that you give them?

A. Well, this prescription I have often given them. For instance, he originally sent some samples which I used on certain individuals, and they proved satisfactory, so I had him send me some of

(Testimony of Maurice Eugene Bachman.)

these "M. D." preparations, and I have given it to patients for use, instead of having [118] to go to a druggist and a drug store to buy it. I wanted to know what value it had, and they got the box, I mean, I was able to hand them the box, and they have never asked me what it stands for. They just wanted to know whether it worked.

Q. Your patients don't usually ask you those questions, what the name stands for? But they do ask you whether it works or not? A. Yes.

Q. And they have confidence in you, don't they?

A. Yes.

Redirect Examination

By Mr. Cohn: [119]

Q. You said you had obtained this formula in 1926 and that was the reason I was asking you how it compared with the others.

A. This was recent work. I mean at the time we gave it. But we knew no reason why it should. I mean we did not understand the reason for the use of this formula. Somebody concocted it and we used it, but never really knew what the thing did, why it should help. [120]

EDWARD A. BACHMAN

was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Rhodes:

Q. Give your full name to the Reporter.

A. Edward A. Bachman.

Q. Where do you live, Mr. Bachman?

A. 2235 Northeast 25th Avenue.

Q. Portland? A. Portland.

Q. What is your business?

A. At the present time I am in the Army on active duty.

Q. What business are you engaged in as a general thing in the [123] City of Portland?

A. Drug and manufacturing.

Q. Where is the business located?

A. 439 Northwest Broadway is the drug store; 411 Northwest Broadway is the manufacturing and drug distributing.

Q. How long have you been engaged in manufacturing and distributing drugs?

A. Since 1935.

Q. What drugs do you manufacture?

A. Put up preparations for sale in drug stores.

Q. What preparations?

A. Cough syrup—such things as cough syrup and liniments and U. S. B. & N. F. preparations.

Q. Do you manufacture or compound any medicinal preparations?

(Testimony of Edward A. Bachman.)

A. U. S. B. & N. F. are medicinal preparations.

Q. Do you compound or manufacture any medicinal preparations?

A. Yes, sir, the U. S. B. & N. F.

Q. What preparations do you manufacture or compound?

A. For use in drug stores, you mean?

Q. Any use. A. Any use?

Q. Yes.

A. Well, we made up citrate of magnesia, Bashman's Mixture, and Chloroform Liniment; also vitamin combinations, specifically by name called B-plex, that is an infusion of synthetic [124] vitamins.

Q. Do you manufacture or compound a mixture which you designate MD. Medicated Douche Powder? A. No, sir.

Q. Do you sell a douche powder which you designate as MD. Medicated? A. Yes, sir.

Q. How long have you sold that?

A. Since 1936.

Q. By whom is that compounded or prepared?

A. McKesson & Robbins, Portland, Oregon; originally Blumaeur & Frank, then McKesson & Robbins, Portland, Oregon. If it is permissible I would like to add that we have compounded it for prescription purposes.

Q. You say you have——

A. I say I have compounded it for prescription purposes—that MD powder.

Q. And how long have you been selling that MD powder? A. Since 1936.

(Testimony of Edward A. Bachman.)

Q. Do you advertise it? A. Yes, sir.

Q. In what medium?

A. Newspapers and pamphlets.

Q. Pamphlets or circulars accompanying the preparation.

A. Yes, sir, at one time. We don't now. [125]

Q. Were those pamphlets or circulars and newspapers circulated through the mails?

A. Yes, sir.

Q. Are they now advertised in those mediums and circulars in the mails? A. No, sir.

Q. When was the circulation through the mails discontinued? A. In 1939.

Q. What date? A. October, 1939.

Trial Examiner Reeves: Off the record.

(A discussion off the record.)

Trial Examiner Reeves: On the record.

Q. (By Mr. Rhodes) The complaint on pages 3 and 4 sets out certain representations that are purported to have been made in the mediums described by you just now. Are those correctly set out in the complaint? A. Yes, sir.

Q. Did you at one time or do you now sell a preparation known as Contra-Jel?

A. No, sir—oh, did I at one time? Yes, sir, at one time, but not now.

Q. When did you discontinue the sale of that?

A. In 1938, I believe.

Q. About what period in 1938?

A. I would guess it was in the middle of the year—say [126] August.

(Testimony of Edward A. Bachman.)

Q. Was that manufactured or compounded by you? A. No, sir.

Q. Was it manufactured or compounded for you?

A. Yes, sir.

Q. Did the manufacturer place the name on it?

A. No. Was that question "Did the manufacturer place his name on it"?

Q. No, the name.

A. The name—through our suggestion. We named it. They put it down but we named it.

Q. The formula for that was presented to the manufacturer by you. A. No.

Q. Well, will you explain your former answer.

A. That formula is the exact duplicate of a preparation called Koromex manufactured by the Holland-Ranthon Company of New York who manufactured that same article for us under our name—Contra-Jel.

Q. And they put the name on it?

A. They stuck the label on it. The original shipment they sent us had the labels stuck to the tube called Contra-Jel.

Q. Was there any question between you and the manufacturers with respect to that product, with the use of your name or their name in connection with the sale of it? [127] A. No, sir.

Q. How many shipments of that product did you receive from the manufacturer?

A. About three shipments.

Q. When was that?

A. 1933 was the first shipment.

(Testimony of Edward A. Bachman.)

Q. When was the last?

A. I am guessing now. I would say the last was about 1934 somewhere, or 1935—late in 1934.

Q. Didn't you request permission of the manufacturers to use their name in connection with the advertising of it and didn't they decline?

A. We didn't use their name.

Q. Will you answer my question, please?

A. Well, I don't understand it.

Mr. Rhodes: Read the question.

(Last question read by reporter.)

A. No.

Q. (By Mr. Rhodes) What was the reason that they ceased to manufacture this product for you?

A. The sale was too limited, and we had difficulty with the product because it froze up in shipment, was in bad condition, and they failed to make adjustment.

Q. And you discontinued the sale of that product about what period? [128]

A. In 1938.

Q. There is a stipulation that has been entered into between you and the Federal Trade Commission, is there not, either by you personally or your attorney for you, in which you state that you have discontinued the sale of Contra-Jel?

A. Yes.

Q. And agreed not to resume the sale of it?

A. Yes, sir.

Q. Now that product was also advertised by you, was it not?

A. Yes, sir.

Q. In the same mediums as the other product?

A. Yes, sir.

(Testimony of Edward A. Bachman.)

Q. Did you also at one time manufacture a produce known as M.D. Supercones?

A. We didn't manufacture them, no, sir.

Q. You did not manufacture it, but you sold it.

A. Yes, sir.

Q. During what period did you sell that product?

A. Between 1936 and 1938.

Q. Who were the manufacturers of that product?

A. Norwich Pharmaceutical Company.

Q. This product was also advertised by you, was it not?

A. It was not in the newspapers. It was advertised through inserts—not in the newspapers.

Q. The product with those inserts in were shipped by you in [129] interstate commerce? A. Yes.

Q. Through the mails?

A. I don't recall through the mails, but interstate commerce.

Q. You have also entered into a stipulation with the Federal Trade Commission with respect to that product? A. Yes, sir.

Q. Not to sell it in the future. A. Yes, sir.

Q. And you have discontinued the sale of it?

A. Yes, sir. May I insert one thing here. When you asked me a question about advertising Contra-Jel, that was advertised only during the year 1933, as far as newspapers were concerned.

Q. But by inserts and others it was advertised during the whole time? A. Yes, sir.

Q. Do you also manufacture a product known as Femeze? A. No, sir.

(Testimony of Edward A. Bachman.)

Q. Did you sell a produce known as Femeze?

A. Yes, sir.

Q. During what period did you sell that product?

A. A short period—in 1936.

Q. Was that product advertised?

A. Not in newspapers. [130]

Q. Through the same mediums the other products were?
A. Only through inserts.

Q. In the package. A. In the package.

Q. Not by——

A. Newspapers.

Q. Pamphlets?

A. Well, the pamphlets were inserts. Our inserts were in pamphlet form.

Q. Circulars?

A. Well, I would say pamphlets would cover all the advertising.

Q. But other than those that were contained in the package there were no advertisements of that product?

A. I believe we did have a pamphlet besides the inserts in the package.

Q. And did that advertising matter appear on the package?
A. I didn't get the question.

Q. The package or container in which the product was shipped, did the advertising matter appear on the package?

A. On the package? Besides the label on the package you mean, or in the package?

Q. On the package, whether a label or whether printed on the package.

(Testimony of Edward A. Bachman.)

A. There was a label on the package.

Q. Have you advertised that product in the same manner you did [131] the other products?

A. No, sir.

Q. The only advertising done for that product was in the circulars in the package and on the package.
A. And the pamphlets.

Q. Were those pamphlets or circulars circulated separately?
A. Yes, sir.

Q. They were sent out to persons writing in for the product?

A. Yes, I believe they were. On the pamphlet they advertised all these items together.

Q. And if anybody wrote in for a description of the product or for the formula, or what not, you would send them one of those circulars?

A. Pamphlets, yes, sir.

Q. And that is true of the other products, is it?

A. Yes, sir.

Q. And who were the manufacturers of that product?

A. The manufacturer is unknown to me. We bought that—it was an odd lot we bought from a man who was in the Government service. He had had it on hand and we simply bought it for distribution for him and we discontinued it before we got rid of it—as a matter of fact we junked it.

Q. Did you have any correspondence with the manufacturers of that product?

A. No, sir. [132]

Q. With respect to the product?

(Testimony of Edward A. Bachman.)

A. No, sir. The original manufacturer, as I understood it, died. It was a doctor who made it up and he passed away. That's what this man told me.

Q. Did you have any correspondence with the manufacturer of the M.D. Supercones with respect to that product? A. Yes, sir.

Q. In that correspondence did they say whether or not they would permit you to use their name in connection with the product?

A. We had no correspondence on that subject.

Q. Did you register any one of these several products with the Oregon Board of Pharmacy?

A. Yes, sir.

Q. Which one? A. Contra-Jel.

Q. Did you register any of the others?

A. No, sir.

Q. Did you register Medicated Douche Powder?

A. No, sir.

Q. Did you register Femeze? A. No, sir.

Q. Did you register M.D. Supercones?

A. No, sir.

Q. Is that the only one of those products you did at any time [133] register with the Oregon Board of Pharmacy, was the Contra-Jel.

A. With one exception; that the original Supercones bought from the Norwich Company were not registered, but I made some up myself and registered with the Oregon Board of Pharmacy for one year. We weren't selling any, but we registered the name of some we made up ourselves.

(Testimony of Edward A. Bachman.)

Q. Did you have to renew that registration from year to year? A. Yes, sir.

Q. Is Contra-Jel, M.D. Supercones, Femeze and M.D. Medicated Douche Powder registered at this time for the year 1941? A. No, sir.

Q. None of them? A. No, sir.

Q. Did you apply for registration of any of these products with the Oregon Board of Pharmacy except the one year for Contra-Jel?

A. We applied for Supercones?

Q. Was that granted?

A. The ones I made up myself, yes, sir.

Q. The registration was granted?

A. Yes, sir.

Q. Now, as a matter of fact didn't the Board of Pharmacy, the Oregon Board of Pharmacy, notify you that M.D. Supercones suppository could not be registered under the law?

A. Yes, sir, those refer to the ones made by the Norwich Com- [134] pany.

Q. But subsequent to that time you had made some? A. Yes, sir.

Q. And you did submit them? A. Yes.

Q. And they were passed by the Board?

A. Yes, sir.

Q. Did the Board so notify you?

A. Yes, sir.

Q. But you applied for registration with the Board what other products?

A. None of them.

(Testimony of Edward A. Bachman.)

Q. What other of these products mentioned in the complaint? A. None.

Q. You never applied for registration of M.D. Medicated Douche Powder? A. No, sir.

Q. I now hand you a document and ask if you can identify that, please.

A. I think so—that's right.

Q. That is an application, is it?

A. Yes, sir.

Q. Filled out by you? A. Yes.

Q. To the Oregon—— [135]

A. Board of Pharmacy.

Mr. Rhodes: I will offer this.

Mr. Levinson: No objection.

Trial Examiner Reeves: The document identified by the witness will be received in evidence as Commission's Exhibit 41.

(The document referred to was marked "Commission's Exhibit 41" and received in evidence.)

Q. (By Mr. Rhodes) Was this application for license of M.D. Supercones granted by the State Board? A. No, sir.

Q. It was refused, was it?

A. Yes, sir. You are referring to the same one I just looked at?

Q. Yes. A. Yes.

Q. So that the product M.D. Supercones was never licensed by the Oregon Board of Pharmacy.

A. With the exception of the ones I made up myself later and took down to the Board of Pharmacy

(Testimony of Edward A. Bachman.)

at Oregon State College and had it tested, which their chemist approved.

Q. And the Board then did issue a license for registration?

A. That I can't quite remember. I will have to check on that. May I make an explanation or is it all right?

Q. Yes, I think so. [136]

A. I would like to explain in connection with this, whether we offered any of these articles for registration, contraceptives are the ones offered for registration and that is the reason M.D. was never offered because M.D. is not a contraceptive and I don't claim it to be.

Q. Did you submit to the Federal Trade Commission specimen copies of the advertisements of your several products appearing in newspapers and pamphlets and on cartons in which the products were shipped?

A. I don't recall exactly what we submitted. We submitted everything they asked for.

Q. I now hand you a carton containing a tube of medicine for a medicinal preparation and ask you if you can identify that, please.

A. Yes, sir.

Q. That is the preparation sold by you?

A. Yes, sir.

Q. During the period stated.

A. Yes.

Mr. Levinson: You haven't identified that.

Q. (By Mr. Rhodes) And that advertisement

(Testimony of Edward A. Bachman.)

appearing thereon was placed thereon prior to shipment of the product. A. Yes, sir.

Q. This is designated as Contra-Jel.

A. Yes, sir. [137]

Mr. Rhodes: I offer that.

Mr. Levinson: I think it should be identified with a number before it is offered.

Trial Examiner Reeves: The carton containing the tube may be marked for identification as Commission's Exhibit 42-A and the tube contained in the carton may be marked for identification as Commission's Exhibit 42-B.

Mr. Levinson: The respondent objects to the introduction into evidence of Federal Trade Commission's exhibits identified as 42-A and 42-B on the grounds and for the reason that the evidence indicates that these items contained in this exhibit have not been sold by the respondent prior to the institution of this complaint and therefore it is irrelevant to this hearing.

Trial Examiner Reeves: The objections are overruled and the carton marked for identification Commission's Exhibits 42-A and the tube inserted therein marked for identification 42-B are received in evidence, each taking the respective number given it for identification.

Mr. Levinson: May we ask that an exception be noted?

Trial Examiner Reeves: An exception may be noted.

(Testimony of Edward A. Bachman.)

(The carton and tube referred to were marked Commission's Exhibits 42-A and 42-B, respectively, and received in evidence.)

Mr. Rhodes: I offer now for identification, if [138] Your Honor please, a box marked Supercones.

Trial Examiner Reeves: Is it an empty carton?

Mr. Rhodes: There is something in it.

Trial Examiner Reeves: Well, the carton may be marked for identification as Commission's Exhibit 43-A and the contents may be marked for identification as Commission's 43-B

(Carton and contents referred to was marked Commission's Exhibit 43-A and 43-B, respectively.)

Q. (By Mr. Rhodes) I hand you this and ask you if you can identify the package.

A. Yes, sir.

Q. Is that a package sold by the respondent?

A. Yes, sir.

Q. And shipped as described in your testimony?

A. Yes.

Mr. Rhodes: I now offer the package and the contents in evidence, if Your Honor please.

Mr. Levinson: The respondent objects to the introduction of Federal Trade Commission Exhibits 43-A and 43-B on the ground and for the reason that said exhibits are incompetent, immaterial and irrelevant to the issues in this case, and for the further reason it appears from the testimony that

(Testimony of Edward A. Bachman.)

these particular exhibits have not been sold or distributed since the filing of the complaint or since the enactment of the law. [139]

Trial Examiner Reeves: The objection is overruled, and the carton and the contents are received in evidence as Commission's Exhibit 43-A and 43-B.

Mr. Levinson: May we note an exception?

Trial Examiner Reeves: An exception may be noted.

(Carton and contents referred to were marked Commission's Exhibit 43-A and 43-B, respectively.)

Mr. Rhodes: I now offer for identification a package, being a can labeled M.D. Medicated Douche Powder.

Trial Examiner Reeves: This may be marked for identification as Commission's Exhibit 44.

(Can referred to was marked Commission's Exhibit 44 for identification.)

Q. (By Mr. Rhodes) I will ask you to state whether or not that product in that package was sold by the respondent.

A. That's right.

Q. In the manner described in your previous testimony? A. Yes.

Mr. Rhodes: I now offer that package, if Your Honor please, with its contents—it has a powder content as I understand it, in evidence.

The Witness: May I add that this is an old pack-

(Testimony of Edward A. Bachman.)

age and for several years there has been a trade mark package instead of this one.

Q. (By Mr. Rhodes) In what respect would the trade mark package differ from that? [140]

A. It had the markings on it U. S. Patent Office, with a number.

Mr. Levinson: Respondent has no objection to the offer into evidence.

Trial Examiner Reeves: The container and its contents are received in evidence as Commission's Exhibit 44.

(Can and contents referred to was marked "Commission's Exhibit 44" and received in evidence.)

The Witness: There was another change on the package, the name was changed to Stanley Drug Products Co. instead of Stanley Laboratories.

Q. (By Mr. Rhodes) You now operate under the name Stanley Drug Products?

A. Yes, have for some time—ever since this complaint.

Q. And the product is sold by the Stanley Drug Products Co.?

A. At the present time, yes, sir—Incorporated.

Mr. Rhodes: I now ask this package, being an envelope marked M.D. Medicated Douche Powder be received for identification.

Trial Examiner Reeves: It may be marked for identification "Commission's Exhibit 45".

(Package referred to was marked "Commission's Exhibit 45" for identification.)

(Testimony of Edward A. Bachman.)

Q. (By Mr. Rhodes) Will you state whether or not that package or similar packages were sold by the respondent in the [141] manner described in your testimony.

A. Yes, sir. Not sold—they were distributed and not sold.

Q. You distinguish between those that are sold and those that are distributed free—is that distributed for advertising purposes? A. Yes.

Mr. Levinson: The respondent has no objection to the introduction in evidence of Exhibit 45 which appears to be a sample.

Trial Examiner Reeves: The container and its contents are received in evidence as Commission's Exhibit 45.

(Container and contents referred to were marked "Commission's Exhibit 45" and received in evidence.)

Q. (By Mr. Rhodes) I now hand you a glass tube and ask if you can identify that?

A. Of course, that is a hard thing to identify. There are millions of them exactly like that that are sold to any one who wants to purchase them. It is an appliance that can be bought anywhere on the open market and it may be ours or it may not be.

Mr. Levinson: Describe it.

The Witness: This is an applicator to be connected to a tube of vaginal jelly. I couldn't identify it as ours, there are no identification marks on it.

(Testimony of Edward A. Bachman.)

Q. (By Mr. Rhodes) And the tube of jelly which you say might [142] be attached is Commission's Exhibit 42-B, is that what you refer to?

A. Yes, sir.

Q. You did in the course of conduct of your business furnish such a tube in connection with the Contra-Jel.

A. Yes, sir.

Q. As shown on Commission's Exhibit 42-A and B?

A. Yes, sir.

Q. And while you can't identify that particular tube you did furnish tubes similar in character?

A. Yes.

Q. And appearance?

A. That's right.

Mr. Rhodes: I ask that be received in evidence, if Your Honor please.

Mr. Levinson: Respondent objects to the introduction into evidence of Exhibit 46 for the same reason that respondent gave in objecting to the introduction of Exhibits 43-A and 44-A and B.

Trial Examiner Reeves: The objection is overruled and the tube is received in evidence as Commission's Exhibit 46.

Mr. Levinson: May we note an exception?

Trial Examiner Reeves: The exception will be noted. [143]

(Tube referred to was marked "Commission's Exhibit 46" and received in evidence.)

Q. (By Mr. Rhodes) I now offer for identification a package with its contents, the contents being a form of tablet and ask if you can identify that?

A. Yes.

(Testimony of Edward A. Bachman.)

Q. What is it?

A. It is a package of Femeze.

Q. Was that sold by the respondent company?

A. Yes, sir, temporarily—a short period. Yes, it was sold.

Mr. Levinson: You say it is sold?

The Witness: Not now. All of this information I am giving is what happened before 1940. We are not selling any of these items and haven't been selling them for some time—we don't even have them.

Q. (By Mr. Rhodes) Does your answer apply to all the items you have identified?

A. With the exception of M. D. Douche Powder all those items haven't been sold for over a year or a year and a half.

Mr. Rhodes: I now offer the box with its contents in evidence, if Your Honor please.

Trial Examiner Reeves: Any objection?

Mr. Levinson: The respondent will object to the introduction into evidence of Exhibit 47 on the ground and for the reason that it appears from the evidence that respondent [144] is not engaged in the sale and distribution of said product and therefore the exhibit is incompetent and immaterial and irrelevant to the issues in this case.

Trial Examiner Reeves: The objection is overruled and the carton will be received in evidence as Commission's Exhibit 47-A and its contents will be received in evidence as Commission's Exhibit 47-B.

(Testimony of Edward A. Bachman.)

Mr. Levinson: May I note an exception?

Trial Examiner Reeves: An exception is noted.

(Carton and contents referred to were marked "Commission's Exhibit 47-A" and "Commission's Exhibit 47-B.")

Q. (By Mr. Rhodes) Referring to Commission's Exhibit 46 being a glass tube, what would you describe that as in your literature?

A. A nozzle or applicator.

Q. The exhibits you have identified beginning with 42-A and running to and including 47 are exhibits, or exhibits similar thereto, that were furnished by you to the Federal Trade Commission, were they not? A. Yes, sir.

Q. I hand you copy of page 17 taken from the Oregon Daily Journal, Portland, Oregon, for April 20, 1938, and direct your attention to an advertisement in the lower left hand corner and ask if you can identify that as an advertisement inserted by the respondent. [145] A. Yes.

Q. I call your attention to the Daily Olympian, Olympia, Washington, dated March 23, 1938, and direct your attention to an advertisement appearing in the lower left hand corner and ask if you can identify that? A. Yes.

Q. The advertisement referred to is marked "M.D." Medicated Douche Power for Feminine Hygiene", is that right? A. Yes.

Q. And the advertisement referred to in the previous exhibit, Exhibit 32, is marked "M.D. for Feminine Hygiene", is that true? A. Yes.

(Testimony of Edward A. Bachman.)

Q. I now direct your attention to advertisement appearing on page 5 of the Daily Olympian of Olympia, Washington, and direct your attention to an advertisement captioned "M.D. Medicated Douche Powder" and ask if you can identify that?

A. Yes, sir.

Q. Are those advertisements all advertisements that were inserted by the respondent?

A. No, by the Advertising Agency.

Q. For the respondent? A. Yes, sir.

Q. I now direct your attention to the issue of March 23, 1938, of the Register Guard of Eugene, Oregon, and direct your [146] attention to an advertisement captioned "To Keep Dainty and Sweet" with the letters "M. D. for Feminine Hygiene". Was that inserted by the respondent?

A. Yes, sir.

Q. I now hand you page 6 of the Seattle Post-Intelligencer for Wednesday, May 6, 1936, and direct your attention to an advertisement appearing thereon, in the left hand corner of the page, and ask if you can identify that?

A. Yes, sir.

Q. It is captioned "M.D. for Feminine Hygiene". Was that inserted by the respondent?

A. Yes, sir; the respondent advertising agency.

Q. For the respondent?

A. For the respondent, yes, sir.

Mr. Rhodes: I now offer for identification, if Your Honor please, a leaflet and ask that it be marked.

(Testimony of Edward A. Bachman.)

Trial Examiner Reeves: It will be marked for identification Commission's Exhibit 48.

(The leaflet referred to was marked "Commission's Exhibit 48" for identification.)

Q. (By Mr. Rhodes) A leaflet advertising Femeze, and ask if you can identify that, Mr. Bachman? A. No, sir.

Q. I will ask you if that is not a leaflet that was furnished by you to the Federal Trade Commission? [147] A. I don't think so.

Q. I will ask you if that is not a leaflet that is inserted in the package of Femeze when sold and shipped by the respondent? A. No, sir.

Mr. Rhodes: I now offer for identification, if Your Honor please, a folder, or rather a pasteboard carton labeled "Femeze" among other things.

Trial Examiner Reeves: It may be marked for identification Commission's No. 49.

(Carton referred to was marked "Commission's Exhibit 49" for identification.)

Q. (By Mr. Rhodes) I will ask if you can identify that? A. No, sir.

Q. I will ask you if that is not the carton in which was contained some pellets or a product described by the printed matter appearing thereon?

A. What was the question?

Mr. Rhodes: Repeat the question.

(Last question read by reporter.)

Mr. Rhodes: That was sold by the respondent.

A. No, sir, I can't tell that.

(Testimony of Edward A. Bachman.)

Q. I will ask you whether or not you furnished that carton, together with those contents to the Federal Trade Commission?

A. I furnished a carton. I wouldn't say this carton. [148]

Q. Similar to this? A. Yes.

Q. With the same printed matter on it. There is a difference in the printed matter on the inside.

Mr. Rhodes: I now offer for identification, if Your Honor please, a letter dated September 12, 1938, signed Stanley Laboratories, Inc., by E. A. Bachman.

Trial Examiner Reeves: It may be marked for identification Commission's Exhibit 50.

(Letter referred to was marked "Commission's Exhibit 50" for identification.)

Q. (By Mr. Rhodes) I will ask you to state whether or not you can identify that letter, please.

A. Yes, sir.

Q. Did you write it?

A. It was written under my instructions.

Q. Did you sign it?

A. That is not my signature.

Q. Was any one authorized to sign that letter for you? A. Yes, sir.

Q. Will you read into the record the three lines——

A. (Reading) "In compliance with your request of September 7 we are today mailing you under separate cover three samples of 'Femeze'".

(Testimony of Edward A. Bachman.)

Q. I now ask you, since you have refreshed your memory by [149] reading this, whether or not you furnished the carton which is offered to you for identification as Commission's Exhibit 49, and the leaflet identified as Commission's Exhibit 48, if you submitted those to the Federal Trade Commission? A. I can't say that I did.

Mr. Levinson: Just a moment, I want to object to the form of the question unless counsel for the Federal Trade Commission will also offer the letter of the Commission to which this is an answer.

Mr. Rhodes: The letter is in the possession of the respondent, if Your Honor please.

Trial Examiner Reeves: Off the record.

(Discussion off the record.)

Trial Examiner Reeves: On the record. Do you desire to examine the witness?

Mr. Levinson: Yes, I would like at this time to interrogate the witness with reference to Exhibit No. 50.

Trial Examiner Reeves: You may proceed.

Q. (By Mr. Levinson) Mr. Bachman, I am calling your attention to Exhibit No. 50 which is an original letter dated September 12, 1938 on the letterhead of Stanley Laboratories, addressed to Mr. James A. Horton, Chief Examiner Federal Trade Commission, Washington, and the contents of the letter has to do with mailing under separate cover three samples of Femeze. Now I am handing you this exhibit and ask you if you know

(Testimony of Edward A. Bachman.)

what the [150] content of the letter was that you received from the Federal Trade Commission to which Exhibit 50 is the response?

A. As I recall it we carried on correspondence with the Federal Trade Commission for quite some time and we have always tried to comply with all their requests and among their requests was one that we send them samples of products we distributed after we had named the items. The first letter previous to this one, they asked what we distributed and we named these items and when they asked us to send them some samples we sent them some samples. It may be we picked the samples off the very first delivery these people made before we substituted the pamphlets, but we took the pamphlets out and procured new ones with the Stanley Laboratories' name on them. That is the ones we shipped in interstate commerce. Before we distributed any in interstate commerce we put in a pamphlet, generally a copy of this, except we changed the name.

Q. Do I understand Exhibit 50 is just part of a series of correspondence?

A. That's right.

Mr. Levinson: I believe that is all.

Trial Examiner Reeves: As I recall you were offering in evidence the documents marked for identification 48 and 49.

Mr. Rhodes: And 50—the letter. [151]

Trial Examiner Reeves: Are there any objections? The articles and documents marked for

(Testimony of Edward A. Bachman.)

identification as Commission's Exhibit 48, 49 and 50 are now received in evidence, each taking the respective number given it for identification.

Mr. Levinson: The respondent is objecting to the introduction into evidence as products of the respondent Exhibits 47, 48 and 49, on the ground and for the reason that the same are incompetent, immaterial and irrelevant.

Trial Examiner Reeves: The objections are overruled.

Mr. Levinson: May we note an exception?

Trial Examiner Reeves: An exception is noted.

(The articles and documents referred to were marked "Commission's Exhibit 48", "Commission's Exhibit 49", and "Commission's Exhibit 50", and received in evidence.)

Q. (By Mr. Rhodes): Upon receipt of the Federal Trade Commission's letter of September 7, as indicated by your letter of September 12, 1938, you did comply with the request and submit three samples of Femeze in the original carton in which they were sold. A. Sold how?

Q. As you have described heretofore in your testimony. A. No, not that way. [152]

Trial Examiner Reeves: Off the record.

(Discussion off the record.)

Q. (By Mr. Rhodes): Is this Stanley Laboratories a closed corporation?

A. It was a closed corporation. Stanley Laboratories is out of existence.

(Testimony of Edward A. Bachman.)

Q. Are you operating under a corporate name at this time? A. Yes, sir.

Q. And what is the corporate name?

A. Stanley Drug Products, Inc.

Q. Is that a closed corporation? A. Yes.

Q. Who owns the stock?

A. Edward A. Bachman and William J. Ward and Mrs. A. J. Bachman.

Q. There is none sold on the open market?

A. No.

Q. You manage and control and direct the affairs of the corporation?

A. I was at that time. I am in the Army now and have been for three months, and I am not active at all.

Q. And it is owned and operated chiefly by you and your wife? A. No, sir; 50 per cent.

Q. You own 50 per cent?

A. My wife and I together have 50 per cent.

[153]

Q. Who owns the rest?

A. William J. Ward.

Q. Prior to the organization of the new company you owned a controlling majority of the stock in the corporation?

A. No, sir, 50 per cent, never controlled it.

Q. Did you direct affairs of the corporation?

A. Just from the office standpoint. As a matter of fact, the sales and the distribution was handled by my partner William J. Ward. I handled the office.

(Testimony of Edward A. Bachman.)

Q. But it was largely under your control and direction.

A. No control—I had 50 per cent. At no time have I had more than 50 per cent.

Q. Well, were the other stockholders permitted to do anything they choosed with it?

A. I didn't get that question.

Q. Were the other stockholders permitted to do anything they pleased with the management, run it in any manner they saw fit, or did you have some voice in it? A. I had 50 per cent of voice.

Q. I will hand you the exhibits that have been offered in evidence in this case, beginning with Commission's Exhibit 7 and running through to Commission's Exhibit 31, inclusive, and ask you to identify those if you can and state for the record with respect to each when it was used in the business conducted by the respondent. [154]

Trial Examiner Reeves: Mention the number in each case, please.

A. No. 7——

Trial Examiner Reeves: State what it is, please.

A. It is a carton from Contra-Jel.

Mr. Levinson: That is supposed to be 42-A—you are getting them confused.

Mr. Rhodes: I am not getting them confused. I am trying to get him to identify these.

Trial Examiner Reeves: There is probably a duplicate there.

Mr. Rhodes: It might or might not be a duplicate of those we introduced this morning.

(Testimony of Edward A. Bachman.)

A. Yes, it is a duplicate. That is exactly a duplicate of the carton of Contra-Jel. We have never had any other kind that has been sold during the years of '33 to about '38, the middle of '38.

Trial Examiner Reeves: Go to the next, please.

A. This is a pamphlet.

Trial Examiner Reeves: What is the number—8?

A. No. 8-A-B—Exhibit 8—this pamphlet is describing the uses for M. D. Medicated Douche Powder.

Trial Examiner Reeves: What use is made of it, what distribution?

A. It was used as an insert in the can of M.D. and was also [155] used as an advertising medium in reply to inquiries.

Trial Examiner Reeves: Take the next, please.

A. This is, Exhibit No. 9, a pamphlet describing the uses for Femeze.

Trial Examiner Reeves: What use of distribution was made of that?

A. This was used as an insert in the package of Femeze by the man who sold me the merchandize. I got it with this pamphlet in it.

Exhibit 10 is an insert in the package of Contra-Jel with directions for use which was used for that purpose.

Exhibit 12 is a broadside used when M.D. was first introduced on the market, designed by the advertising agency, using pictures of nurses and doc-

(Testimony of Edward A. Bachman.)

tors which were leased from the Underwood & Underwood people.

Q. Was that used by the respondent in advertising the product?

A. Yes, used by us as an advertising feature.

This again is the same ad as the broadside——

Q. (By Mr. Rhodes): What are you referring to? A. Exhibit 13 are duplicates——

Q. 15 is it not?

A. 15 is the exhibit number. These are three advertisements of M. D. Medicated Douche Powder which are duplicates of the broadside used by us for newspaper advertising.

Exhibit 16 is two advertisements with pictures of [156] women advertising M. D. Douche Powder which are also copies of the broadside used in newspaper advertising.

Exhibit 17 is three advertisements featuring M. D. Douche Powder used by us in advertising in newspapers.

Q. Are these advertisements used in newspapers, or are the exhibits just referred to, 15, 16 and 17, circulars? A. Newspapers.

Q. Wholly in newspapers?

A. Wholly in newspapers—no other purpose.

Q. Will you describe Commission's Exhibit 18.

A. Exhibit 18 is a copy of the formula for M.D. Medicated Douche Powder which we sent to the Commission.

Q. And Exhibit 19?

(Testimony of Edward A. Bachman.)

A. Exhibit 19 is a reply in compliance with the request by the Federal Trade Commission for the formulas of M. D. Medicated Douche Powder, and also Contra-Jel, also stating that the formula of Femeze is not known to us, since these were distributed by Mr. Clark of Salem, Oregon previous to our purchase. Also that the M.D. Supercones were made for us by the Norwich Pharmaceutical Company, that they have the formula and that they are not making those any more as of the date June 22, 1938.

Exhibit 25-A is a pamphlet or a duplicate of Exhibit No. 8 used for the same purpose.

Exhibit 26-A is a pamphlet used by us for advertising- [157] ing M. D. Medicated Douche Powder and Contra-Jel.

Exhibit 27-A is an insert that was used by us in advertising the M.D. Medicated Douche Powder containing a coupon applicable on the purchase of Contra-Jel.

Exhibit 28 is a coupon used as an insert advertising M.D. Medicated Douche Powder.

Exhibit 29 is an insert advertising Supercones—M.D. Supercones.

Exhibit 30 is a pamphlet on Femeze which I identify as our own, signed by Stanley Laboratories, of Portland, Oregon. That is what I had reference to. That is the reason I couldn't identify the others. Used as an insert in a package of Femeze.

Exhibit 31 is a piece of advertising, advertising

(Testimony of Edward A. Bachman.)

M. D. Medicated Douche Powder used as an insert to the trade, to the drug trade.

Q. All of those exhibits which you have previously identified were used by the respondent in their business at some time during the course of their business. A. Yes, sir.

Q. Mr. Bachman, were you interviewed sometime in December, 1938 by Mr. White of the Federal Trade Commission?

A. I recall that such was the case. I don't recall the exact date.

Q. He visited your place, did he not? [158]

A. Yes, sir.

Q. And at that time did you or did you not state to him that the only laboratory equipment and the only experts of the Stanley Laboratories was such as were made known to him at that time.

A. I would like to know what was made known to him at that time.

Q. Did you then state that you did not have any laboratory equipment? A. I don't believe so.

Q. Did you ever state to Mr. White that you did not conduct a laboratory?

A. That would be true.

Q. As a matter of fact it is true that you neither have nor had a laboratory equipped for compounding medicinal preparations.

A. That is not true. I have a laboratory for compounding medicinal preparations, but not a laboratory in the sense the Federal Trade interprets it now.

(Testimony of Edward A. Bachman.)

Q. Will you state what equipment you had in your laboratory at that time that Mr. White interviewed you.

A. We had all of the utensils and equipment necessary for compounding U.S.B. & N. F. preparations. We had our scales, our metric and avoirdupois weights, our mortars and pestles. We had our mixers and we also had a tube filling machine and a [159] tube closing machine.

Q. And you had experts?

A. We had technicians, and a registered pharmacist in charge.

Q. Did you or did you not have experts qualified to conduct experiments, and compound such medicinal preparations?

A. What do you mean by experiments?

Q. Well, would a person with the education of, or whose vocation was a ditch digger be qualified to do that work?

A. Well to answer that I would say we did have experts qualified to do that.

Q. What were their qualifications?

A. Registered pharmacists, and manufacturing pharmacists.

Q. And you had those at that time that Mr. White interviewed you?

A. Yes, sir.

Q. And you made that known to Mr. White at that time?

A. I cannot recall that, what questions he asked or what answers I gave. As a matter of fact, Mr. White called on me twice. He called on me once

(Testimony of Edward A. Bachman.)

approximately in 1936 or 1937. Now I don't know what was said then and I can't recall what was said in the subsequent visit.

Q. Well, he did call on you on two occasions?

A. Yes, sir.

Q. And he did discuss with you the equipment of your laboratory and whether or not you had a laboratory. [160]

A. Well, I don't recall the exact conversation. I remember this, that he wrote down everything I said so you ought to have it there. That would refresh my memory.

Q. Whatever Mr. White wrote down at that time is in substance what the conversation related to and what it was. A. If I signed it.

Q. And if you didn't sign it?

A. I wouldn't know.

Q. You wouldn't deny it?

A. I wouldn't deny it if it was true and if it was something that wasn't true I would have to deny it. I remember the question about the equipment, not from Mr. White, but it came from Mr. Horton, of the Federal Trade Commission, and we have a copy of the letter we sent him back identifying all the items used in manufacturing.

Q. Did or did not Mr. White interview you on March 16, 1937?

A. I don't know the date, but Mr. White did interview me.

Q. He interviewed you on two occasions, one was prior to 1938 and the other was in 1938.

(Testimony of Edward A. Bachman.)

A. 1937.

Q. In response to the inquiry propounded by Mr. White "Where is the laboratory located" Mr. White reports that you said it was located in the drug store. A. At that time that was true.

Q. Mr. White then reports that he asked to be shown the [161] laboratory and you replied, as reported by Mr. White "Well, it is just where you are." And you were then standing at the cigar counter.

A. Mr. White is very wrong. I think a person of any average intelligence wouldn't make that kind of a remark, and I assume I would not make such a remark.

Q. In reply to the question whether you had a laboratory or not Mr. White reports that you stated no, you didn't have.

A. I cannot recall such an answer.

Q. In reply to the question "How many employees"—this question was asked prior to the question as to whether you had a laboratory or not—as to how many employees were employed in the laboratory Mr. White reports that you stated that there were none. Is that true or not?

A. What year is this report?

Q. 1937, March 16.

A. That is not true, because we had a salesman—at least that much—someone had to sell it.

Q. Mr. White asked you then further with respect to the number of employees, and who they were and you stated "Those who work at the cigar

(Testimony of Edward A. Bachman.)

counter, at the food counter, and who wait on the drug trade are the persons who run the laboratory.”

A. Why would it be necessary for me to answer that question if my reply to the question regarding the number of employees [162] I had was none.

Mr. Rhodes: These questions were asked prior to the other questions. I thought I prefaced my question with that statement.

Mr. Levinson: I would like to note an objection to this line of inquiry, if the Court please, on the ground and for the reason that all this conversation alleged to have been had between the witness and Mr. White was in the year 1937, which would be prior to the amendment to the Federal Trade Commission law, and therefore any conversation on any matters relating to any purported violations of any law would be before there was such a law and therefore it would be incompetent, immaterial, and irrelevant and I therefore ask that all this testimony be stricken out for that very reason.

Trial Examiner Reeves: The motion will be denied.

Mr. Levinson: May we note an exception.

Trial Examiner Reeves: An exception will be noted.

The Witness: Will you read that question again?

(Last question read by Reporter.)

Q. (By Mr. Rhodes): What is your answer to that question?

A. I think a person's pride as a pharmacist

(Testimony of Edward A. Bachman.)

wouldn't permit him to answer such a thing as written down on that paper there.

Q. Do you answer it or do you decline to answer it? [163]

A. I answer that it is untrue.

Q. Mr. White reports that he further asked you during the course of the conversation whether you had a microscope or a sterilizing equipment of any kind and you answered no.

A. That is true, whether he asked it or not, that is true. Why is it necessary to have that in manufacturing mixed powder? [164]

Q. (By Mr. Rhodes): Further with respect to your conversations with Mr. White at the time he interviewed you in March, 1937 Mr. White states he asked you why you used the name Stanley Laboratories, and states that you said that you used the name Stanley Laboratories because you wanted the public to draw the conclusion that your products were manufactured in a laboratory, is that true or not?

A. No, sir. May I explain why the name is used?

Q. Yes.

A. The name Stanley Laboratories is derived from my son's name, Stanley, and I used it because I thought in the future perhaps the business would build up to where he could take it over.

Q. Why did you use the word laboratories?

A. Because at that time it was the accepted term used by anyone manufacturing or distributing drug

(Testimony of Edward A. Bachman.)

products. We simply used it because there were so many items similar to that that used laboratories that we used it without considering whether it was irregular or not. This was in 1937. Previous to the manufacture of this powder we used the name Stanley long before that. We used that away back in 1933 when we originally [165] put out Contra-Jell and before that we used it for preparations we made up in the drug store. We called those Stanley. This same M.D. Douche Powder was called Stanley Powder before we put it in this can. We used to make it in the drug store there.

Q. That was before you used the letters M. D.

A. Yes, sir, that's right. We called it Stanley Laboratories.

Q. How did you come to use the letters "M.D." in connection with this preparation?

A. Well, sir, I had a lot of experience in manufacturing, preparing and compounding things, and when I came to the powder, I originally called it Stanley's Douche Powder, and we had Post-Office Pharmacy on it, which was the name of the drug store, then when the sales became so big in the store, and we felt we had a good article and that it had the approval of the public, we began to seek some catchy name for the sale of the article. Medicated Douche Powder, beginning with M. D.—it is an abbreviation of medicated douche—we simply named it M. D., then followed it with Medicated Douche, explaining the M. D. It was

(Testimony of Edward A. Bachman.)

brief and catchy and besides that we had heard of that name before on some other products.

Q. Did you state to Mr. White in that conversation that the letters M.D. were used because they would lead the public to believe that it was medicated?

A. Not that way. I explained exactly as I explained to you, sir, [166] that M. D. were abbreviations for Medicated Douche. If you interpret it that way I would say yes.

Q. Why was the picture of a nurse used in connection with it?

A. That was something, being in the drug business as long as I had, I had seen many articles that people were purchasing. There were other articles with pictures of nurses. It was catchy and a way to identify it.

Q. Did you state to Mr. White at that time you used it because it would convey the impression the product had been endorsed by the Medical Association?

A. No, sir.

Q. You deny that you made such a statement?

A. I deny it.

Mr. Rhodes: That is all the questions I have of this witness at this time.

Trial Examiner Reeves: You may cross-examine.

Cross Examination

By Mr. Levinson:

Q. Mr. Bachman, what is your occupation in civil life?

A. Druggist.

(Testimony of Edward A. Bachman.)

Q. Will you state your qualifications for being a druggist?

A. Well, I graduated from college.

Q. What college?

A. North Pacific College of Oregon, degree of Ph. D.

Q. What year? [167]

A. 1922, and since that time and before that time I was working in drug stores and owned my own store beginning with 1925 until the present day. During my practice of pharmacy I had many occasions to prepare and compound combinations for people who felt that they were good enough articles, that they encouraged me to try to make them up for sale purposes, and also during the time that I was a practicing pharmacist I had the good fortune of being elected president of the Portland Retail Druggists' Association, and later the state president. I also belong and have belonged to the National Association of Retail Druggists, and held membership in the American Pharmaceutical Association, reading and receiving all their literature and advanced studies in pharmacy and I take pride in saying that I am up to date as far as pharmacy is concerned.

Q. You were called into active service by the Government?

A. Yes, sir, I have been in the Reserves in the Army for the last eleven and one-half years and in this emergency they called me in for service in the hospital.

(Testimony of Edward A. Bachman.)

Q. What is your occupation in the hospital?

A. I am a First Lieutenant, hold the rank of First Lieutenant, in charge of the hospital funds and in charge of the post exchange funds and supervisor of the pharmacy.

Q. You are located where?

A. Barnes General Hospital, Vancouver, Washington. [168]

Q. Calling your attention to this particular product which is known in the record as M.D. Medicated Douche Powder please tell us when you first manufactured and distributed that powder.

A. Under the name M.D.?

Q. M.D.

A. Under the name M. D. we first began to distribute it in February of 1936. We made it before that under the name of Stanley's Douche Powder.

Q. Whose formula is that?

A. That is our own—my own—originally the formula was given to me by a brother who is a physician in Detroit, and being in close touch with him he would quite often send me some favorite formula of his. This one appealed to me particularly because of it being every one of the things said about it, mildly antiseptic and cooling and refreshing, and all the things we have said about it, and I added another ingredient, which through reputable books has been recognized as a very effective antiseptic, and that is Oxyquinolin Sulphate, and by adding that to his formula I felt I had

(Testimony of Edward A. Bachman.)

something worth while and I discussed it with many people and with physicians, so finally I decided to put it on the market because of the insistence of a lot of my customers.

Q. Could you tell us for the record what this formula is?

A. Yes—you mean the ingredients themselves?

[169]

Trial Examiner Reeves: Off the record.

(Discussion off the record.)

Trial Examiner Reeves: On the record.

The Witness: It is on the label.

Q. (By Mr. Levinson): Where is this medicated douche powder compounded?

A. At the present time, or when this question came up—

Q. No, in the last few years.

A. In the McKesson & Robbins Laboratory.

Q. That is a branch of McKesson & Robbins that have laboratories throughout the United States?

A. Yes, they have a very complete manufacturing plant where they manufacture many household necessities, remedies, and special formulas, under what is called a private label. This would be called a private label. They manufacture it for us, because we felt it was less expensive to have them do it, than going to the expense of buying the necessary machinery.

Q. You furnished them with the formula and they compounded it for you?

A. That's right. And at one time they were

(Testimony of Edward A. Bachman.)

packaging it also. When this took place McKesson used to package the entire product and supply it to us, until the new Pure Food & Drug Act Amendments took effect, then they manufactured the powder for us, shipped it to our company, and we employed people to package that powder into these cans and insert the literature [170] and distribute it.

Q. Do you also compound this in your drug store without using the package?

A. Well, of course in the past we packaged goods because it is more convenient, but for quite some time, when McKesson used to make it up over there, before they made it up, we had prescriptions, or quite often without any prescriptions we would make it up for people in the store. That is the way we started to sell it. We used to put it up in glass jars before we called it M. D., in our store.

Q. You say you would receive prescriptions from doctors. What would be the nature of the prescriptions?

A. Well, the prescriptions were this way. The doctors would come in and we would mention the fact we were putting up this douche powder. It is a very common practice for the physician to simply put down "Antiseptic powder for douche," because as a rule all these formulas are rather lengthy and they don't like to sit down and write out what they call shot-gun prescriptions, or eight or nine ingredients, because they don't remember the quantities very well, or they might forget some-

(Testimony of Edward A. Bachman.)

thing, and quite often they write "Antiseptic powder" and we understand this is what they want, and give them this powder.

Q. In other words, doctors have discussed this particular product? [171]

A. That's right.

Q. And had recommended its use?

A. Yes. We also had left samples occasionally with doctors we felt would be inclined to prescribe it and they would use the samples possibly in their office and people would go in and ask for a can of M. D. They very seldom write out the whole prescription. That is the general rule for any of these douche powders, and there is one quite big seller in the state and the doctors will say this—or name it by name—and you say "How did you happen to ask for it", and they will say, "Well, the doctor said so."

Q. Mr. Bachman, I am handing you what purports to be a printed statement issued by the United States Patent Office, registered April 4, 1939, trade-mark 366203, and registered October 5, 1938, trade-mark 361632, and ask you to look at these two exhibits, and tell us what they are.

A. This is the first trade-mark we got because of the design, and after we heard from the Federal Trade Commission and they didn't like the cross in there and the design in general we thought we would modify it perhaps to gain the favor of the Commission, and we changed it over to this and had this for a trade-mark. This has no cross on it.

(Testimony of Edward A. Bachman.)

Mr. Levinson: I would like to offer into evidence the two exhibits and have them identified by some number. [172]

Mr. Rhodes: May I inquire what the purpose is in offering these?

Mr. Levinson: The purpose is to show that the letters M. D. were not held out to the public as meaning medical doctor, but this is a trade-mark or trade name for the particular product as recognized by the Patent and Trade-mark Office of the United States Government.

Mr. Rhodes: I object to the introduction in evidence of the exhibits, if the purpose is as stated by counsel for the respondent, for the reason that if they are accepted they must be accepted for whatever they can be purported to be worth and not for the purpose of establishing the fact that M. D. does not represent medical doctor.

Mr. Levinson: I will make that additional suggestion in this offer.

Trial Examiner Reeves: Your objections?

Mr. Rhodes: I was offering my objection in my statement.

Trial Examiner Reeves: Well, later counsel qualified his offer.

Mr. Rhodes: I further object to it for the purpose of establishing any fact at issue in the case with the Federal Trade Commission against the respondent.

Trial Examiner Reeves: The objection is overruled and the document identified as trade-mark 361-

(Testimony of Edward A. Bachman.)

632 is received [173] in evidence as Respondent's Exhibit No. 1.

Mr. Rhodes: Note my exception.

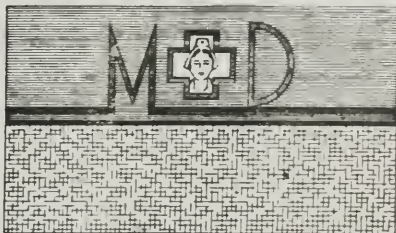
(The trade-mark referred to was marked "Respondent's Exhibit 1", and received in evidence.)

UNITED STATES PATENT OFFICE

Stanley Laboratories, Inc., Portland, Oreg.

Act of February 20, 1905

Application June 6, 1938, Serial No. 407,162



STATEMENT

To the Commissioner of Patents:

Stanley Laboratories, Inc., a corporation duly organized and existing under and by virtue of the laws of the State of Oregon, with its principal place of business in the city of Portland, Oregon, and doing business at 439 Northwest Broadway in said city and State, has adopted and used the trade-mark shown in the accompanying drawing, for SANITARY NAPKINS, in Class 44, Dental, medical, and surgical appliances, and presents herewith five (5) specimens showing the trade-mark as actually used by applicant upon the goods, and requests that the same be registered in the United States Patent Office in accordance with the act of February 20, 1905, as amended.

The trade-mark has been continuously used on and applied to said goods in applicant's business, or its predecessor's business, since on or about the 15th day of October, 1935.

The trade-mark is applied or affixed to the goods or to the packages containing the same by means of a label or wrapper bearing the mark

or by imprinting or impressing said mark thereon, or the mark may be applied in divers other ways to the goods or to the package containing the same.

The drawing is lined to indicate the colors sky blue, navy blue, and cream and the unshaded portion indicates white. The facial representation as a feature of the mark is fanciful.

The undersigned hereby appoints Samuel S. Jacobson (registration No. 13,157) of 810 Yeon Building, Portland, Oregon, its attorney, with full power of substitution and revocation, to prosecute this application and make all such alterations and amendments therein as may be required, to sign the drawing, to receive the certificate, when issued, and to transact all business in the United States Patent Office connected therewith.

STANLEY LABORATORIES, INC.,
By E. A. BACHMAN,
President.

FEDERAL TRADE COMMISSION

Docket No. 4130 ~~COMPLAINT~~ Exhibit No. 1
RESPONDENT'S
IN THE MATTER OF Stanley Laboratories
DATE 6/26/41 WITNESS Bachman
REPORTER Boylan

(Testimony of Edward A. Bachman.)

Trial Examiner Reeves: And the document designated as trade-mark 366203 is received in evidence as Respondent's Exhibit No. 2.

Mr. Rhodes: My exception applies.

Trial Examiner Reeves: Your exception may be noted.

(The trade-mark referred to was marked "Respondent's Exhibit 2", and received in evidence.)

4130

2

Stanley Labs.

H. A. Bachman

H. W. Boylan

UNITED STATES PATENT OFFICE

Stanley Laboratories, Incorporated, Portland,
Oreg.

Act of February 20, 1905

Application October 10, 1938, Serial No. 411,471



STATEMENT

To the Commissioner of Patents:

Stanley Laboratories, Incorporated, a corporation duly organized under the laws of the State of Oregon and located at Portland, Oregon, and doing business at 432 Northwest Broadway, Portland, Oregon, has adopted and used the trade-mark shown in the accompanying drawing, for FEMININE HYGIENE PRODUCT—NAMELY, A MEDICATED DOUCHE POWDER—in Class 6, Chemicals, medicines, and pharmaceutical preparations.

The trade-mark has been continuously used and applied to said goods in applicant's business since on or about the 5th day of July, 1938.

The applicant presents herewith five specimens and a drawing showing the trade-mark as actually used by applicant upon the goods, and requests that the same be registered in the United States Patent Office in accordance with the act

of February 20, 1905. The trade-mark is applied or affixed to the goods or to the packages containing the same by means of a label, or wrapper bearing the mark or by printing or impressing said mark thereon, or the mark may be applied in diverse other ways. The portrait appearing in the drawing of the trade-mark is fanciful.

The undersigned hereby appoints James J. Hayden, Esquire, of 737 Woodward Building, Washington, D. C., his attorney, to prosecute this application for registration, with full powers of substitution and revocation, and to make alterations and amendments therein, to receive the certificate, and to transact all business in the Patent Office connected therewith.

STANLEY LABORATORIES

INCORPORATED,

By EDWARD A. BACHMAN,

President.

(Testimony of Edward A. Bachman.)

Q. (By Mr. Levinson): Mr. Bachman, calling your attention to the Federal Trade Commission's exhibits, and particularly the one that is numbered Commission's Exhibit 44, and calling your attention to the letters "M" divided by a cross and a nurse, then "D", will you tell us the purpose that you had in using those particular letters?

A. Well, the purpose is as I explained before, they are abbreviations for Medicated Douche, and also it was euphonic in sound and made it more easily remembered.

Q. Has any customer ever come into the store or come into your place of business or has anyone ever asked you whether or not M. D. was a product made by doctors?

A. The only place I saw that was in the first copy of the stipulation, the first mention I had of any doctors. [174]

Q. What stipulation?

A. The complaint, the Federal Trade Commission made a complaint to us on what they felt about it.

Q. Have you ever received any complaint from any person, whether a customer or otherwise, to the effect that M. D. on the can indicated that it was a product endorsed by the medical profession?

A. We had no such complaints.

Q. Can you tell us approximately how much of this medicated douche powder you manufacture or distribute year by year?

(Testimony of Edward A. Bachman.)

A. Naturally we are selling more now than we did when we started. Do you want total sales per year now?

Q. Let us take from the year 1938 up to the present time.

A. In numbers of cans, or dollars and cents?

Q. I would suggest—well, in dollars and cents might be all right.

A. About ten or twelve thousand dollars a year.

Q. That has been a consistent average the last few years?

A. That would average pretty well for the entire period. We are selling more than that at present and less than that before 1938.

Q. Now in the operation of your drug store do you wait upon the trade too?

A. Yes; on many occasions I would wait on the trade. [175]

Q. Will you tell us whether or not customers would come in and ask for this product by its trade name? A. Quite often.

Q. Are there various kinds of this product manufactured under other names? A. Yes, sir.

Q. Will you state, for the purpose of the record, the names of some of the douche powders that are distributed here in our state.

A. One of them is Takara, a very popular seller; another one is Sharpe & Dohm's Bocaral.

Q. Now, when a customer would come into the store——

(Testimony of Edward A. Bachman.)

A. I would like to add another name to that. McKesson & Robbins puts out one called U-M.

Q. When a customer comes into the store and they ask for an antiseptic powder, what is generally the inquiry made?

A. Well, you mean the woman customer?

Q. Yes, a woman customer.

A. Well, it is just like buying sanitary napkins, or anything in the feminine hygiene line, they are a little shy and it is an advantage to be able to name something quickly, either say "Takara" or "M.D." or "Bocaral". That is as far as they will go. They want to get out of there as quick as they can.

Q. In other words, the purchase of this particular product [176] is generally accompanied by some embarrassment?

A. Yes.

Q. And they like to have some quick trade-name to ask for.

A. Quick identification.

Q. Now in the sale of this product which is called Medicated Douche Powder, what representations are made to the public as to its value or use that you know of, what particular recommendations, if any?

A. Well, we put it this way, we sell it to the trade as a mildly antiseptic cleansing and cooling preparation for women to be used as a vaginal douche and also to be used as a foot wash, as a gargle, or where any preparation is indicated that needs to be mildly antiseptic and cooling and soothing.

(Testimony of Edward A. Bachman.)

Q. Have you in the sale of this product sold any of it to any institutions?

A. Yes, we have. We sold it to a clinic—started to sell them as far back as three years ago. At Vancouver, Washington they have a doctors' clinic up there, and they wrote in and made inquiries and made investigations, and bought it.

Q. Are there any other clinics or institutions?

A. Well, not that I know of.

Q. Now, with reference to the sale of Contra-Jel and Femeze, when was that discontinued in interstate commerce?

A. Just as soon as we heard from the Federal Trade, which [177] was about in 1938. Contra-Jel I think was discontinued even before that.

Q. Do you know about the approximate date?

A. I would say 1938 to be safe. I will say May, 1938.

Q. Are you now distributing either of those products? A. No, sir.

Q. And are you adhering to the stipulation you entered into with the Federal Trade Commission?

A. Yes, sir.

Q. Now, with reference to the use of a picture of a doctor, or of a nurse in the advertising of this particular product, is that condition now existing?

A. No, sir, we discontinued it also in our stipulation. We haven't used that since our last contract that we have with the newspaper. Back in May of 1938 was the last contract, and I think the last piece of advertising that had that objectionable

(Testimony of Edward A. Bachman.)

advertising ended in October, 1938, and we haven't had any since.

Q. Where did you get the idea of the picture of the nurse—the doctor?

Mr. Rhodes: I object to that, if your Honor please. It doesn't make any difference where he got the idea.

Mr. Levinson: I will reframe the question.

Q. (By Mr. Levinson) Is it not a fact that in the sale of medicinal preparations, patent medicines and the like, it has [178] been the practice of the trade to have a picture of a girl dressed like a nurse or a man with a goatee or something that might look like a doctor?

A. It is so much the practice I think I mentioned in earlier testimony that people like Underwood & Underwood who supply advertising agencies with pictures supply those and recommend that it would be a good sales point, and our advertising agency got the thing together, and we assumed it was all right.

Q. Can you tell us whether or not there exists now, or has existed for many years last past, advertisements of various kinds which have pictures of doctors and nurses?

Mr. Rhodes: I object to that question, if your Honor please. It doesn't make any difference how other people advertise their products.

Trial Examiner Reeves: The objection is sustained.

Mr. Levinson: We will note an exception. Shall

(Testimony of Edward A. Bachman.)

we make an offer of proof? Is that the practice before the Commission?

Trial Examiner Reeves: That has been done at hearings at which I have presided.

Mr. Levinson: I would like to make an offer of proof. If this witness were permitted to answer the last question he would have testified that it is the practice and the custom and has existed for such a great length of time in the United States as well as other countries in the advertising [179] of medicinal preparations to show on the product or in the advertisement a facsimile of an individual who is commonly known as a doctor or a person who is dressed up like a nurse, and that such a practice has come to be a custom used by the manufacturers of medicinal products, indicating to the public that the products are drug products.

Trial Examiner Reeves: The offer is denied.

Mr. Levinson: And we will note an exception.

Q. (By Mr. Levinson) Now have you engaged in any advertising of any kind respecting Femeze?

A. No, sir—you mean newspaper advertising?

Q. Yes. A. No.

Q. Have you engaged in any newspaper advertising of M. D. Supercones? A. No, sir.

Mr. Rhodes: You mean by newspaper? Periodicals?

The Witness: Periodicals, newspapers, or anything like that.

Q. (By Mr. Levinson) When did you cease advertising by newspapers of Contra-Jel?

(Testimony of Edward A. Bachman.)

A. Well, that was away back to about 1935 sometime. The Oregon Board of Pharmacy set up a law prohibiting the advertising of contraceptives. I think that was in 1935.

Q. And since that time you have not advertised it? [180]

A. No, sir, not in newspapers.

Q. When did you stop, or did you stop advertising M. D. Powder?

A. We stopped advertising M. D. Powder completely since early in 1939, and then we resumed advertising upon the advice of our attorney in Washington, with a changed copy that had no claims of any kind, simply naming it, about three months ago.

Q. Some time early this year?

A. Early this year, that's right.

Q. Will you tell us about when you stopped putting pamphlet inclosures in Femeze?

A. We stopped that about early in 1939.

Q. And what about M. D. Supercones, when did you stop inserting pamphlet inclosures on that product?

A. Those were stopped around '37.

Q. And how about Contra-Jel?

A. Contra-Jel—we slipped up on Contra-Jel. There was a piece of a folder that was let out to the public. It went out on packages that were on shelves of druggists that had stayed there for some time. We stopped putting them in packages late in 1939.

(Testimony of Edward A. Bachman.)

Q. There might have been some in prior deliveries? A. That's right.

Q. And you put out new pamphlets on M. D. Powder? [181] A. Yes, sir.

Q. Are you selling Femeze now?

A. No, sir.

Q. When did you stop?

A. We stopped—well, we just junked everything we had the first part of 1940, just threw it away.

Q. How about M. D. Supercones?

A. We stopped selling those in 1938. We only had one supply of those Supercones, the original supply, and we never bought any more, just got rid of what we had.

Q. Are you selling Contra-Jel?

A. No, sir.

Q. Now, with reference to this M. D. Medicated Douche Powder, do you make tests of it from time to time in your own laboratory or own store?

A. Well, my tests made in the store were from the standpoint of keeping qualities, and recently we sent a sample for a test to a reliable chemical firm who gave us a report on it which was particularly satisfactory.

Q. But do you from time to time take a sample of the bulk and test it?

A. Oh yes, we make solutions out of it and test it for the P. H. value.

Q. What is the distribution of this M. D. Douche powder?

A. Well, we have distribution in the states of

(Testimony of Edward A. Bachman.)

California, [182] Oregon, Washington, Alaska, Idaho, Montana, Utah, Nevada, and we also have some in Michigan and have some in Baltimore, and some in New York, and Kansas City.

Q. Originally the name of your company was Stanley Laboratories? A. Yes.

Q. Then changed to Stanley Drug Products, Inc., when was that change effected?

A. We changed that upon advice of our Washington attorney the first of 1940, possibly late in 1939, because this complaint came in that they were not supposed to be called "laboratory", so it meant so little to us, what it was, we simply changed the name and asked for an incorporation under that name.

Q. All your products then go out under the name Stanley Products, Inc.?

A. Just exactly as it is on that can.

Q. Did you ever operate under the name of Stillman Products Co.? A. No, sir.

Q. Did the Stanley Laboratories ever do business under the name of Stillman Products Co.?

A. No, sir.

Q. Do you recall when this Mr. White came to see you?

A. I recall seeing him on two separate occasions and I came [183] up to see him once in Seattle of my own free will.

Q. What was the nature of your visit with him, what was the purpose of it?

A. The first reason that Mr. White came into the

(Testimony of Edward A. Bachman.)

store at the time mentioned in the first report, it seems that there was another firm, the firm at Camas, Washington, manufacturing toilet tissue by the name of M. D. It seems also they were in business a very short time at that time and when our product came on the market we investigated. We knew that there was an M. D. toilet tissue people in the field, but we investigated through the Patent Office in Washington who wrote us back that M. D. trade-mark was open for drugs and chemicals, or medical appliances, which had no interference with any products that were not, so after that advice we went into the field and advertised, and they saw our advertising and they complained to the Federal Trade Commission. That is what Mr. White said. Mr. White was investigating at that time not our product from the standpoint of how good it was or where it was manufactured, or what place, he investigated it from the standpoint of interfering with the trade of M. D. toilet tissue people. That is what he told me then.

Q. Is that M. D. toilet tissue manufactured in Camas, Washington the same as the Pacific Coast Paper Mills, at Bellingham?

A. Yes, it is. [184]

Mr. Levinson: I would like to have this marked for identification.

Trial Examiner Reeves: It may be marked for identification Respondent's Exhibit No. 3.

(Document referred to was marked "Respondent's Exhibit 3" for identification.)

(Testimony of Edward A. Bachman.)

Q. (By Mr. Levinson) I am handing you for identification Respondent's Exhibit 3, and ask you what that is.

A. Well, it is a broadside that usually goes to the trade.

Q. Issued by whom?

A. Issued by the Pacific Coast Paper Mills, of Bellingham, Washington, and showing cuts and mats of the various items that they intend to run and very plainly showing the roll of toilet paper with the letters M. D., and the nurse and the cross, and also sanitary napkins with the letters M. D. and a cross, featuring extra values, to the trade.

Mr. Levinson: The respondent offers in evidence Exhibit 3.

Mr. Rhodes: I object to the introduction of the document into evidence for the reason that it has no bearing on this case at all. It is not one of the respondent's exhibits, but purports to be an exhibit of somebody else with regard to advertisements displayed by some other concern respecting some other product.

Trial Examiner Reeves: The objection is sustained.

Mr. Levinson: I would like to make a statement for [185] the record of our purpose of offering this exhibit. Since Your Honor has ruled I won't do it unless you withdraw the ruling——

Trial Examiner Reeves: You may proceed.

Mr. Levinson: The purpose of offering Respondent's Exhibit 3 is to show to the Commission that the letters M. D. in and of themselves or per se are

(Testimony of Edward A. Bachman.)

commonly used in the trade and do not mean medical doctor or doctor of medicine, but it is merely a trade-mark or a couple of letters which may be considered by the public as having to do with something used by individuals on their bodies, or what not. It is merely a trade-mark or trade name and does not in and of itself mean, or can it be deemed to mean, Doctor of Medicine. That is the purpose of my offer.

Trial Examiner Reeves: The offer is denied.

Mr. Levinson: It will be received subject to the objection? Is that the way it goes?

Trial Examiner Reeves: No, it has been marked for identification. If you care to apply to the Commission in person at the final hearing to have this received in evidence they will consider your offer.

Mr. Levinson: Well, in other words it is received for identification only?

Trial Examiner Reeves: It is marked for identification only. [186]

Mr. Levinson: All right.

Trial Examiner Reeves: I propose that you keep that yourself. The Reporter will not be charged with the custody of it.

Mr. Levinson: It will appear in the record, though?

Trial Examiner Reeves: Well, your comment will appear in the record.

Mr. Levinson: That is what I mean.

Q. (By Mr. Levinson): Now you testified on direct examination, Mr. Bachman, that you also

(Testimony of Edward A. Bachman.)

compound, sell and distribute other products. Now will you tell us whether or not Stanley Products, Inc., manufacture, sell and distribute other products under the same name of Stanley Drug Products Co.

A. No, sir. What I had reference to was in the drug store.

Q. You were also asked the question of whether or not you had a laboratory. Will you tell us briefly whether you have the essential equipment in your institution?

A. It all depends on the interpretation of laboratory. When I answered the question to Mr. Rhodes a while ago he said a professional man would be differentiated from a man who digs ditches. Well, we had a very fine prescription department and a prescription department is a laboratory where you compound U.S.B.&N.F. combinations, and I believe in that sense it would be a laboratory. It is a place where we can experiment. We can make up small batches of things and test them [187] and check them and you can get reports on them—have them used and get reports on them—and I would like to invite counsel here to examine our prescription department. We are very proud of its appearance and equipment.

Q. Now, Mr. Bachman, with reference to this particular product, is it antiseptic?

A. Yes, sir, it is antiseptic.

Q. Is there any statement made about this product that is false or misleading?

(Testimony of Edward A. Bachman.)

A. You mean on the can?

Mr. Rhodes: I object to that. The statements speak for themselves. They are in evidence.

A. There are no statements on the can. Directions for use is all that is on there.

Mr. Rhodes: Well, representations made with respect to the product are contained in the advertisements and pamphlets, and on the package in which they are contained, is that not true?

The Witness: That is right.

Mr. Rhodes: They speak for themselves, if Your Honor please.

Q. (By Mr. Levinson): Have you held out any advertising to the public or to the trade to the effect that M. D. is a contraceptive?

Mr. Rhodes: I object to that, if your Honor please. [188] The advertisements speak for themselves.

Trial Examiner Reeves: The objection is sustained.

Q. (By Mr. Levinson): Mr. Bachman, you testified on direct examination that no application has been made to the Oregon State Board of Pharmacy to register the M. D. Douche Powder. Is that true?

A. Yes, it is true, and the reason we did not ask for it is because we don't consider it a contraceptive and the Board of Pharmacy in the State of Oregon upon our first distribution of this product issued a letter informing the trade, to whom it may concern, that this product was permitted to be sold in either drug stores, or stores that had a shopkeeper's li-

(Testimony of Edward A. Bachman.)

cense, which are licenses which permit them to sell harmless drugs. That was issued, in 1936, in the month of February or March right after we distributed it. The reason that came up was because some merchants felt because they were not drug stores, and they wanted to buy this for resale purposes, that they had no authority to buy it if it was a contraceptive, but could buy it if it was a mild antiseptic, and the Board issued that letter.

Mr. Levinson: I believe that is all.

Trial Examiner Reeves: Off the record.

(Discussion off the record.)

Mr. Levinson: I will move the Court to withdraw Respondent's Exhibit No. 1. [189]

Trial Examiner Reeves: It will be so ordered.

Redirect Examination

Q. (By Mr. Rhodes): With respect to the product Contra-Jel.

Q. You did at one time so advertise it.

A. Yes, sir.

Q. Now with respect to Femeze.

A. No, sir, not in newspapers, at no time. We only advertised [190] it through pamphlets once, as inserts.

Q. You did advertise it through pamphlets and circulars at one time? A. Yes. [191]

Mr. Rhodes: Without objection, if Your Honor please, I offer that in evidence as Commission's exhibit.

Mr. Levinson: We have no objection.

(Testimony of Edward A. Bachman.)

Trial Examiner Reeves: It will be received as Commission's Exhibit 51. [193]

Redirect Examination

Q. (By Mr. Rhodes): I will ask you now with respect to the advertisement on the can, does a picture of a nurse and a cross appear on the can in which the product is contained?

A. That was not the question.

Q. I am asking you now. A. Yes, sir.

Q. Together with the letters M. D.

A. Yes, sir. [194]

ELOISE DOUGLAS,

was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Rhodes:

Q. Will you give your full name to the Reporter? A. Eloise Douglas.

Q. Where do you live?

A. Portland, Oregon.

Q. Are you engaged in any kind of business?

A. I am employed as a stenographer for the Oregon State Board of Pharmacy.

Q. In the course of your employment do applications for registration of pharmaceutical products pass through your hands? A. Yes, sir.

Q. Are they kept in files accessible to you?

(Testimony of Eloise Douglas.)

A. That's right.

Q. At my request have you examined your files with respect to [195] Stanley Laboratories?

A. Yes, sir.

Q. And Stanley Products, Inc.

A. Yes, sir.

Q. That last is Stanley Drug Products, Inc. Upon examination of the records will you state whether or not either of these companies, Stanley Laboratories, Inc. or Stanley Drug Products, Inc. have registered with the Oregon State Board of Pharmacy the product Femeze.

A. According to our records they have never registered this product.

Q. Have they ever registered a product designated M. D. Medicated Douche Powder?

A. No, sir.

Mr. Levinson: I think the records would be the best evidence, if Your Honor please, if there are records.

Trial Examiner Reeves: Well, I think in the interests of saving time we shouldn't require them to bring the records over.

Q. (By Mr. Rhodes): Have they ever registered a product known as M. D. Medicated Supercones?

A. Well, is this for 1941 or previously?

Q. During 1941 do your records show whether or not that M. D. Medicated Supercones were registered by the respondent?

A. According to our records they have regist-

(Testimony of Eloise Douglas.)

ered no products, [196] including Supercones, for 1941.

Q. Have they registered a product known as Contra-Jel? A. Not for 1941.

Q. They have not registered any of these products?

A. No, for 1941 they haven't registered any of their products.

Q. Was registration applied for by the respondent for the registration of M. D. Supercones?

A. No, sir.

Q. Or for M. D. Medicated Douche Powder?

A. No.

Q. I hand you Commission's Exhibit 41 which purports to be an application by the Stanley Laboratories to the Oregon Board of Pharmacy for the registration of two products, one designated Contra-Jel and one designated M. D. Supercones, a suppository containing Oxyquinolin Sulphate, and ask you to examine that, please, and state what was done by the Board with respect to the application of the registration of M. D. Supercones?

A. Well, the M. D. Supercones in this case were tested by our laboratory and they didn't meet our requirements. Therefore the license is only issued for the Contra-Jel.

Cross Examination

By Mr. Levinson: [197]

Q. Now, what is the purpose of registering

(Testimony of Eloise Douglas.)

various medicated products with the Oregon State Board?

A. Well, under the Oregon Prophylactic and Contraceptive Law, no products of this kind like Contra-Jel can be sold in Oregon unless they are licensed by the Oregon Board of Pharmacy.

Q. Then no application has been made to register M. D. Medicated Douche Powder. Is that right?

A. That's right.

Q. And you have received no application from Stanley Drug Products, Inc. to register any of its products?

A. For 1941?

Q. Yes.

A. No, sir.

Q. Did you at any time ever receive any application to register M. D. Medicated Douche Powder?

A. No, sir. [199]

F. R. STIPE

was thereupon called as a witness for the Commission, and having been first duly sworn, testified as follows:

Direct Examination

By Mr. Rhodes:

Q. Give your name to the Reporter, please.

A. F. R. Stipe.

Q. Where do you live?

A. Portland, Oregon.

Q. How long have you lived there?

A. Oh, it has been close to 45 years.

(Testimony of F. R. Stipe.)

Q. What is your business?

A. Wholesale drugs.

Q. How long have you been engaged in the business of wholesale drugs? A. About 26 years.

Q. What is the style of the firm with which you are connected?

A. At the present time McKesson & Robbins, Inc.—Blumaeur-Frank, Pacific Division—I think that is it.

Q. Is that a wholesale drug company?

A. Wholesale drugs.

Q. Both companies whose names you mentioned are wholesale druggists?

A. It is one concern. McKesson-Robbins bought the Blumaeur-Frank Drug Company and they were consolidated. McKesson [200] Pacific Company was the other firm, that is the McKesson concern, so they distinguished by Blumaeur-Frank Pacific Division here in Portland.

Q. Are you familiar with the products, such as Medicated Douche Powder, Contra-Jel, Subcones, used by women, are you familiar with those products?

A. Subcones? No, I am familiar with the M. D. Medicated Douche Powder and Contra-Jel, but I can't say that I am familiar with——

Q. Supercones.

A. Yes, I think I have heard of that name, yes.

Q. I am asking you now if you are familiar with this class of products? A. Yes.

Q. And the uses to which they are put?

(Testimony of F. R. Stipe.)

A. Yes.

Q. What is the general purpose and use to which they are put, or the use made of them by women?

A. Why, sanitation I would say and germicide, supposedly [201] preventing conception.

Q. I believe you stated you were familiar with the product known as M. D. Medicated Douche Powder? A. Yes.

Q. A product that was offered for sale and sold by Stanley Laboratories. A. Yes.

Q. And now being sold by Stanley Drug Products, Inc. A. Yes, sir. [202]

DR. NORMAN A. DAVID

was thereupon sworn as a witness by the Commission and testified as follows:

Direct Examination

By Mr. Rhodes:

Q. Give your full name to the reporter, please.

A. Norman A. David.

Q. What is your occupation, Doctor?

A. I am a teacher at the University of Oregon Medical School, Professor of Pharmacology.

Q. How long have you occupied that position?

A. I have been there since September, 1937.

Mr. Levinson: The Respondent will admit the Doctor's qualifications.

(Testimony of Dr. Norman A. David.)

Q. (Mr. Rhodes, continuing) What branch of medicine do you specialize in?

A. I teach pharmacology, which is the study of drugs, their action on living tissues, humans, animals, and also I teach materia medica which deals with the source and origin of drugs and plants,—plant drugs—and toxicology which concerns the symptoms of poisoning and the treatment of poisoning. [206A]

Q. What is the nature of your clinical work?

A. I do some clinical work in that I am an instructor in medicine in the out-patient clinic at the University of Oregon Medical School. I am also Chairman of the Student Health Committee, taking care of the medical students.

Q. Have you had any experience treating female patients?

A. I have done some research work recently which concerned the treatment of a female condition of the vagina trichomonas infection—I did this work in conjunction with another physician who is a gynecologist and this work consisted in studying the effects of the drugs we used on the organism.

The drug we used was Iodochlor Oxyquinaline, which is closely related to Oxyquinaline Sulphate.

We carried out this work at the State Tuberculosis Hospital and Industrial School for Girls at Salem. The study consisted of introducing this particular drug into the vagina and observing the effects on the organism. We would make tests to see whether or not the organism disappeared after a suitable period

(Testimony of Dr. Norman A. David.)

of treatment. That was about 2 years ago we concluded that study.

Q. You mentioned the treatment of what was it?

A. Trichomonas. It is a very common female condition. It is an infestation in that it isn't an organism, it is a parasite which is present and invades the vaginal canal but it does not usually get into the blood stream, so we call it an infestation [207] rather than an infection, and I would say it is present in about 50 per cent. of all women. It causes leukorrhea, itching, discharge,—a very odorous discharge—and it is very unpleasant, rather resistant to treatment, also.

Q. And what is the drug you mentioned you used in treatment?

A. The drug is Iodochlor Oxyquinaline. It is commonly known as Vioform-Ciba.

Q. Have you ever done any special work with Oxyquinaline Sulphate?

A. About 10 years ago, I assisted in a rather extensive study of the treatment of amebic dysentery or amebiasis, and this involved considerable research. A part of the study was devoted to a comparison of the various Oxyquinaline compounds since they have been known to be effective against amoeba, and we compared several available Oxyquinaline compounds, such as Oxyquinaline itself, Oxyquinaline Sulphate, and different chlorinated Oxyquinalines, such as Iodide or Chlorine combinations of Oxyquinaline.

(Testimony of Dr. Norman A. David.)

The work was done on guinea pigs at to toxicity and also we treated guinea pigs which had a natural infestation with a parasite that is common in guinea pigs, to see which one of these drugs was most effective in curing these animals, and in this way we found this Vioform I mentioned was one of the best drugs for this particular purpose, and Oxyquinaline and Oxyquinaline Sulphate were rather ineffective for the particular work we were [208] doing on amoeba and that is generally true, so far as the drugs compared, the Oxyquinaline Sulphate and Oxyquinaline itself were relatively ineffective in effecting a cure in these animals.

Q. Do you lecture on antiseptics and germicides?

A. Yes, that is part of the course, and I devote about four or five hours in covering all the antiseptics that usually are dealt with in all textbooks on pharmacology and Pharmacy II is devoted to this subject and it is considered as part of the study of pharmacology, the action of chemicals on tissues and on bacteria.

Q. Now, Doctor, in the case before us, we have to do with four medicinal preparations, and I will give you their names, briefly, and then we will dwell on the preparations. In the order in which they are designated in the complaint in this case, they are M. D. Medicated Douche Powder, the second is Contra-Jel,—that is the name of the product; the third is M. D. Supercones, and the fourth is Femeze.

The formula for M.D. Medicated Douche Pow-

(Testimony of Dr. Norman A. David.)

der is shown by Commission's Exhibit 18 in this case. I hand you that exhibit and ask you to examine that, please.

A. I have examined it.

Q. Are you familiar with the various drugs mentioned in the formula? A. Yes, I am. [209]

Q. And their effect? A. Yes.

Q. With respect to this preparation, the following representations are admitted to have been made by the respondent. Those representations are set out in the indented paragraph on page 3 of the complaint which I hand you. Will you examine that? A. On page 3?

Trial Examiner Reeves: Page 2 of that copy.

The Witness: You say M. D. Medicated Douche Powder?

Mr. Rhodes: Yes.

A. Yes, sir.

By Mr. Rhodes:

Q. Will you read that, please?

A. I have read it.

Q. Will you note that it is represented as a valuable prescription for discriminating women produced for discriminating modern women who desire a sanitary and dependable douche to insure their personal hygiene, and I will ask you with respect to that statement if you will give me your opinion?

A. The words "dependable douche" are used with the inference that it is dependable both from a prophylactic, or rather, as a spermicide or contraceptive and dependable in killing infectious

(Testimony of Dr. Norman A. David.)

organisms. And I know of no douche which could [210] be admitted into the female vaginal tract which could be called dependable both from a contraceptive or spermicide and bactericidal action.

Q. You have read the formula?

A. Yes, sir.

Q. In your opinion, would such a douche powder be dependable in the sense in which you interpret it to mean? A. It would not.

Q. The second statement, as I remember it, "It is but recently that scientific research has developed new improved methods to safeguard the health and happiness of married women". Will you give me your interpretation of that?

Mr. Levinson: I would like to note an objection to this, your Honor, on the grounds the question would be incompetent, immaterial and irrelevant and as calling for a conclusion of this witness, which has nothing to do with the medical features of the product.

Trial Examiner Reeves: The objection is overruled.

Mr. Levinson: Note an exception.

Mr. Rhodes: You may answer.

A. Well, in that it is necessary in discussing the advantages and disadvantages and effects of various douche powders in my lectures in pharmacology to the medical students, we consider these different products. We are also obliged to mention or say something about the methods of contraception. Now, this [211] statement is all right alone, not included

(Testimony of Dr. Norman A. David.)

in the body of the other material, because I think that most gynecologists, which I am not qualified as,—most gynecologists admit that the use of a diaphragm along with with some medicated preparation, preferably a jelly, is about the safest method of contraception that we have, and it is admitted generally by all physicians that there is no absolutely dependable method of contraception.

When occlusive diaphragms and medicated preparations are used—those two—the use of the jelly and a diaphragm are not absolutely dependable, so that might be what this statement refers to.

Q. But it does not stand alone, does it—the statement?

A. This statement is included to infer—it applies to the douche powder,—the statement alone might be true, but the way it is read here it refers possibly to the powder, as I see it.

Q. It refers to the product being advertised?

A. Yes, sir.

Q. Now, taking it in connection with the further statement endorsed by physicians,—“Medicated Douche Powder not only cleans the vagina and soothes the delicate membrane tissues but has the added advantage of the protection of Oxyquinoline Sulphate, a dependable safeguard——”

A. As far as being endorsed by physicians and surgeons, I doubt that very much, that physicians and surgeons would [212] generally endorse this as a dependable safeguard.

“The added advantage of the protective action of

(Testimony of Dr. Norman A. David.)

Oxyquinaline Sulphate, a dependable safeguard" is inferring that the Oxyquinaline Sulphate is effective as a spermicide and a safeguard against pregnancy, which it most certainly is not. Oxyquinaline Sulphate is commonly used in douche powders, but it is known that in the quantities that it is included in powders, that is about .3 of 1%, that it is very slightly spermicidal—it kills the sperm very slowly, if at all. Larger concentrations of Oxyquinaline Sulphate, up to 3%, also are slightly spermicidal, but when larger concentrations are used, there is the danger of systemic absorption of the Oxyquinaline Sulphate with possible toxic action on the liver, so as far as it being a dependable safeguard, it is not a dependable safeguard against pregnancy nor against infection by bacteria that may be admitted to the vaginal tract.

Q. Now, with respect to the statement, "Effective in combating any form of bacteria", give us your opinion as to the effectiveness of this powder.

Mr. Levinson: One moment, Doctor, please. Your Honor, I don't like to interpose objections continuously, but I understand that the stipulation has taken care of the matters that counsel is asking the witness, and there has been a stipulation. Now, in spite of the stipulation, will there be [213] evidence offered?

Trial Examiner Reeves: You are referring to the stipulation entered at Washington on the record in this case?

(Testimony of Dr. Norman A. David.)

Mr. Levinson: Yes, that this hearing is limited to I think the misbranding or mislabeling.

Trial Examiner Reeves: I didn't so understand it, and I didn't understand that the stipulation would terminate the taking of testimony on any phase of the proceedings.

Mr. Levinson: In other words, testimony will be introduced and offered on the whole case, irrespective of the stipulation?

Trial Examiner Reeves: Yes, supplemental to the stipulation.

The Witness: Shall I proceed?

Mr. Rhodes: Yes.

A. The statement "Effective in combatting any form of bacteria" is very broad, because there are many forms of bacteria, some of which are very resistant to the action of drugs, such as spores which are certain forms of bacteria, also such as the tuberculosis organism and the spirochete of syphilis also is rather resistant to the action of drugs, and naturally in lecturing to my students, I have to consider something of the action of vegetative forms of bacteria, or spores, or other organisms which may not belong exactly in the classification [214] of bacteria, such as parasites and spirochetes which are on the outer realm of bacteria, so that I think this statement is entirely too broad.

Q. What do I understand you to mean, that the statement is too broad?

(Testimony of Dr. Norman A. David.)

A. That Medicated Douche Powder is not effective in combatting any form of bacteria.

Q. All forms of bacteria?

A. All forms of bacteria.

Q. Now, there is one other statement I want you to give your attention to, and that is the statement, "It relieves women of fatigue and annoying discharge often occasioned by all day standing".

Mr. Levinson: I object to the question on the ground that this witness is not qualified to testify as a gynecologist.

Trial Examiner Reeves: The objection is overruled.

Mr. Levinson: May I note an exception?

A. As a physician and as one who has treated women for leukorrhea in the past, and as one who has to occasionally consider female disorders in discussing the effects of drugs and lecturing on the effects of drugs to medical students, my opinion is that a good many female disorders may be accompanied by fatigue and discharge. These are the basic disorders, [215] and they must be corrected in order to treat the patient. The use of a douche and other things are only temporary remedies, and do not relieve or cure the person who complains of these symptoms. Medicated Douche Powder may through its slightly cleansing and astringent action temporarily clean out the vaginal tract, but how it would relieve the woman of fatigue, other than psychologically, I don't know.

Q. Well, what is your opinion with respect to

(Testimony of Dr. Norman A. David.)

the effectiveness of this powder in relieving the conditions stated?

A. I don't believe that it would relieve women of fatigue or the annoying discharge in the sense that it is implied here, that it relieves them of those conditions.

Q. Now, with respect to the use of the letters "M.D." in connection with this douche powder, will you state what your reaction is as to that?

A. Well, the only interpretation I have of the letters "M.D." is that it refers to Doctor of Medicine, and therefore would be a product that is endorsed by doctors. The letters stand for "Medical Doctor", and naturally that is what one would think.

Q. The letters used in the association in which they are used in this connection, have what effect, in your opinion?

A. It would make me think that the powder is possibly recommended by a physician, but I must supplement that statement because I know that no physician, reputable, ethical physician, [216] sells or puts his approbation on any douche powder. He may prescribe them, or write prescriptions for them, but I do not think that a doctor would sell this with the idea that other physicians and surgeons——

Q. Well, would a doctor write a prescription for a woman prescribing a douche powder without an examination of the woman?

A. No, he would not.

Q. Is there any one douche powder——

(Testimony of Dr. Norman A. David.)

A. There is not.

Q. —or treatment that could be universally prescribed on cases?

A. No, sir. There are many different conditions of the female vaginal tract, many different infections, and these require different forms of medication. There is no one douche powder that would serve the purpose for all conditions.

Q. Now, with respect to the product designated as Contra-Jel, the formula for that product is shown on Commission's Exhibit 19 which I hand you. Are you familiar with the medicines described?

A. I am.

Q. On page 3 of the mimeographed copy of the complaint which I now hand you, the indented matter at the top of the page, it sets out certain advertisements or representations made by the respondent with respect to this product. Will you examine that [217] please?

A. I have examined it.

Q. Now, with respect to the statement, "Contra-Jel is the highest quality vaginal antiseptic in jelly form. It consistently insures even distribution and prolonged contact with every part of the vaginal tract, and its protective action endures as long as it remains within the vagina", will you state for the record what your interpretation is in that respect?

A. The formula of Contra-Jel showed that it again depended or used for one of its active ingredients Oxyquinaline Sulphate, also lactic acid, bo-

(Testimony of Dr. Norman A. David.)

ric acid is contained in the product. It is stated in this complaint that it is a vaginal antiseptic, and the different drugs which I have just mentioned, Oxyquinaline Sulphate, lactic acid and boric acid are possibly mild antiseptics. With reference to the statement that its consistency,—of jelly,—insures even distribution and prolonged contact with every part of the vaginal tract, I believe that statement is misleading or not true, because it is generally known that the jelly must occlude or close over the cervical os,—the entrance to the uterus,—in order to prevent the entrance of spermatozoa, and naturally during the mechanical action of coitus, the preparation Contra-Jel would not be present in sufficient distribution to be effective. Protective action of the drug may endure for a [218] fairly long time, but its protective action infers, or refers to its spermaticidal action as I mentioned before with reference to the M.D. Medicated Douche Powder, that Oxyquinaline Sulphate or lactic acid or boric acid, and I believe in the form it was stated that the PH—that is with reference to the acidity of it—is about 2, those drugs alone, or the acidity of the Contra-Jel or the drugs in combination with the acidity, would not give sufficient protection against the possible admission of some sperm into the uterine canal, that is, the preparation would not be completely protective or spermaticidal since it is admitted that no jelly is completely or absolutely dependable as a spermaticide.

Q. Now, the next statement or representation

(Testimony of Dr. Norman A. David.)

it is said that "Contra-Jel is a harmless, non-irritating, vaginal antiseptic and prophylactic." What do you mean by the term prophylactic in connection with this statement?

A. Prophylactic means,—usually means the prevention of disease, but in the sense that it is used here, it means that it is a preventative against pregnancy as one would naturally interpret the statement, — Contra, — "against", — against pregnancy,—Contra-Jel, and the word is used with more reference to pregnancy than the prevention of disease.

Q. Now, taking up the third preparation, designated in the complaint, M. D. Supercones, it is represented that they are "Stable and do not lose their antiseptic strength,—a powerful[219]yet non-irritating antiseptic—M.D. Supercones remain in effective antiseptic contact for many hours—they are actually soothing and beneficial as well as antiseptic". Will you state, please, what your conclusion is as to the statements made there with respect to Supercones—the impression that it conveys to your mind, and whether or not that statement is truthful?

Q. Are you familiar with the product known at Norwich's Noriform?

A. I have seen the product and know something about it.

Q. Can you state from your recollection as to the formula?

A. The formula—it possibly depends on Oxyquinoline Sulphate in a cocoa butter preparation along

(Testimony of Dr. Norman A. David.)

with boric acid, possibly some alum—I am not sure about the alum—some salicylic acid. That is about as much as I recall about it, the Oxyquinaline Sulphate possibly being the main ingredient.

Q. The formula for Supercones is boric acid, 5 grains, Oxyquinaline Sulphate, 1 grain, salicylic acid, 1 grain, mercury iodide red, 1/200 of a grain—and cocoa butter. Now, referring [220] to the formula for Supercones,—will you go back to the statement in the complaint and examine that, please?

A. I have examined it.

Q. With respect to the statements there made, bearing in mind the formula, will you state for the record your impression of the meaning conveyed by the representations made?

A. In the first place, it is admitted that cocoa butter suppository is less efficient than a jelly in any spermaticidal effect. Also the drugs which are incorporated in cocoa butter—since cocoa butter is not water-soluble—the drugs are not easily distributed over the vaginal tract.

The statement is made here that it is a powerful yet non-irritating antiseptic. A powerful antiseptic would be one which inhibits the growth of most forms of bacteria, and from my knowledge of the drugs incorporated in Supercones, I do not believe that it possesses this effect.

The statement is also made that it is non-irritating. Now, salicylic acid and red iodide of mercury in sensitive individuals may prove to be very irritating. It may cause edema and a swelling of the

(Testimony of Dr. Norman A. David.)

vaginal mucosa and may actually lead to a discharge from the effects of the drugs. That is, of course, in certain sensitive individuals, and no one knows whether or not they have a sensitivity to salicylic acid or to the iodide of mercury until they try it. I may say that people have been known to die from 5 grains of aspirin who had [221] a sensitivity to the drug, and they knew it, also, and the doctor prescribed aspirin in some other preparation, not calling it aspirin, and the people died from the generally used dose of aspirin, so the statement here that it is non-irritating, is not true.

The point that Supercones remain an effective antiseptic contact for many hours, I mentioned previously with relation to Supercones that the cocoa butter prevented the complete distribution of the drugs incorporated in it, and therefore the contact would not be completely effective in so far as being adequately and thoroughly distributed over the vaginal tract or around the cervical os which is the point of entrance of the spermatozoa into the uterine cavity.

As far as the statement that they are actually soothing and beneficial, the word "soothing" refer to lessening irritation or itching of the vagina, and these drugs may have a mild action of that type.

The word "beneficial" is indefinite to me, and I can't interpret as to just what Supercones would be beneficial for.

Q. Would not that refer to the condition of the female organs as applied here?

(Testimony of Dr. Norman A. David.)

A. I would be unable to answer that. I have just stated that there is a possibility of a harmful effect, an irritating effect from the salicylic acid or red iodide of mercury in which it could not be beneficial. [222]

Q. What other use would you say that a Supercone would be put to except for the treatment of female organs as described in this case?

A. No other use, but "female organs" implies those organs within the peritoneal cavity and here it is just the outer vaginal tract, the outer part of the female organs, if you want to call them that, so that it would only be used to prevent infection, for the treatment of leukorrhea, and infectious conditions of the female tract, and for the prevention of pregnancy.

Q. Would this preparation, Supercones, as shown by the formula be effective in the treatment of the conditions you describe—by "effective", I mean, would they be a cure?

A. They would not.

Q. Now, with respect to the product "Femeze", are you familiar with that product and its use?

A. I am—I know about it. I have not used it.

Q. Are you familiar with the formula?

A. I am.

Q. Will you state for the record what the formula of Femeze is?

A. I have seen a package of it, and it is stated on the package that it contains acetphenetidin or Phenacetin, which is an acetanilid derivative that

(Testimony of Dr. Norman A. David.)

is present in the tablet in the strength of $1\frac{1}{2}$ grains of this particular drug. I have also [223] been told that it may be admitted it contains some caffeine. How much, I do not know.

Q. It is stated, with respect to Femeze, or represented, rather, by the respondent, as described in the complaint. Will you examine that, please?

A. I have read it.

Q. It is represented that "Femeze has been found to be a simple effective prescription affording relief for the functional pains and cramps which accompany menstruation—bringing relief in a short time by relaxes the contracted womb muscles, allowing them to react in a natural way. It does not merely deaden your nerves with drugs or narcotics to stop the pain. Femeze contains no narcotics."

Will you state your reaction to the representation made?

A. The statement is made that it relaxes the contracted womb muscles. The womb or uterus is a muscle made up mostly of muscle tissue. Femeze contains acetphenetidin and it is well known that this drug does not act on any of the viscera such as the uterus or the intestinal tract or gall bladder, or the bladder,—urinary bladder. The action of this drug is central, on the so-called pain areas in the brain, the higher parts of the brain, and the action is to lessen the sense of pain so that the woman who is suffering from menstrual cramps feels less pain, and actually the cramps may continue, and there is no action on the uterus. The caffeine in the drug,

(Testimony of Dr. Norman A. David.)

if it [224] admitted that there is caffeine in it—I have heard that there is—together with the phenacetin, the common name for acetphenetidin, to better deaden pain. They both act on the brain and the caffeine may also have a slight stimulating action and make the person feel less fatigued, but if this drug is used in the evening or at bedtime, the caffeine would possibly keep the patient awake during the night at the time when she would probably most desire relief from the menstrual cramps. That is well known, because we have several headache tablets which include acetphenetidin and caffeine and some aspirin in their composition.

Such drugs in combinations are known as fairly good analgesics, particularly for pains of a congestive type, a congestive headache, the discomfort that goes with a common cold and those conditions. There would not be any relaxing action of a contracted uterus brought about by the action of either of these drugs alone or in combination.

Q. The effect, then, if any, in the use of this drug as I understand you, would be to temporarily relieve pain and not to relieve the cause, or the seat of the trouble?

A. Yes, sir. The drug acts centrally and lessens the sense for pain, deadens the sensory parts of the brain.

Q. May the contraction of the uterus be caused by many diseases?

A. It may be caused by a number of female disorders, and if [225] there is such a condition, we,

(Testimony of Dr. Norman A. David.)

as physicians recognize that these conditions must be corrected, and I teach my students that drugs are only for temporary relief, just as they are for toothache. If you have a toothache, you don't take drugs to stop the toothache, you go to the dentist and have that tooth fixed, and the same is true of menstrual cramps. They indicate some pathology or disorder which must be corrected by various means, and not by the use of drugs.

Q. How would you go about determining the disorders as a physician?

A. In my work in the out-patients clinic, I am required to supervise the pelvic examinations, do about four or five a week. I do not qualify as a gynecologist, but there are certain conditions that a physician should be able to recognize, and naturally in order to recognize these conditions, a pelvic examination or examination of the female organs is made, and retroversion or retroflexion of the uterus or tears in the cervix, misplacements, the presence of tumors, cysts, and all those conditions are looked for, and then the condition is summarized or evaluated accordingly.

Q. Can the conditions be evaluated without an examination? A. They cannot.

Q. It is only upon physical examination——

A. Yes, sir.

Q. ——of the patient—— [226]

A. Yes, sir.

Q. ——that it can be determined?

A. Yes, sir.

(Testimony of Dr. Norman A. David.)

Cross Examination

By Mr. Levinson:

Q. Prior to being called here as a witness in this case, had you ever heard of M. D. Medicated Douche Powder?

A. Yes, I had seen it, and I had not heard of it being used—I mean, I had seen it down in the drugstore and saw the label and asked about it, and was told that Mr. Bachman made the product.

Q. Do you know in a general way, or specifically, the ingredients of M. D. Douche Powder?

A. As they have been read out to me.

Q. As a professor, and also in your gynecological work, do you have any objection to the use of a douche powder by a woman?

A. I don't—unless—for certain conditions.

Q. But speaking generally, if a woman would use a douche powder just from a cleansing standpoint, just to wash the vaginal tract, would you as a doctor or professor have any particular objection to that?

A. Generally, no. There are certain conditions, late pregnancy, a very large open cervix, certain pathologic conditions, where you would not wish the introduction of drugs into the uterine [227] canal and those conditions would prohibit or make the use of a douche inadvisable.

Q. Would you say that preparations containing boric acid are objectionable, objected to by doctors, for a vaginal douche?

(Testimony of Dr. Norman A. David.)

A. They are not.

Q. And would you say that potassium alum——

A. No, they are usually included—potassium alum is a very reliable astringent.

Q. And phenol?

A. Phenol is particularly objectionable, and I may be a little super cautious about its use, particularly with reference to these carbolic acid compounds. The proprietary one that we know most commonly—I had better not refer to it by name, but the phenol has a very corrosive and caustic action on the vaginal tract, and the use of pure phenol preparations alone is absolutely dangerous.

Q. But in combination with others——

A. A small amount may be all right.

Q. And eucalyptol, is that used?

A. That is not usually incorporated in douche powders because it is not water soluble. It is there for its pleasant odor.

Q. An oil of white thyme?

A. Oil of thyme, of course, imparts a pleasant odor, and it is an oil and sticks to the mucosa and may be a slight deodorant. [228]

Q. How about oil of peppermint?

A. Oil of peppermint imparts to the vaginal mucosa a slight cooling effect, also its odor is pleasant.

Q. How about zinc sulphate?

A. Zinc sulphate is both astringent and mildly antiseptic.

Q. And all these products I just read, as well as

(Testimony of Dr. Norman A. David.)

Oxyquinaline Sulphate, are they particularly objectionable as a douche properly chemically combined together? A. Not as cleansing douche.

Q. These products are recognized by the Pharmacopoeia as being mildly antiseptic?

A. Yes.

Q. What in your opinion is the meaning given by your profession to the word "antiseptic"?

A. Antiseptic is a substance, a drug, chemical or material of some sort which inhibits the growth of bacteria. There are certain requirements for standardization which is not in my province, it is in that of a bacteriologist who is qualified to talk about these, that is the ability of a certain concentration of a drug to kill certain bacteria in a certain time. There are four or five things that must work together, and an antiseptic is a preparation which inhibits the growth of bacteria.

Q. Does an antiseptic necessarily have to destroy germs?

A. No, that would be a germicide. A germicide kills bacteria.

Q. In other words, a particular product can be antiseptic [229] and not germicidal?

A. That is right. Depending on the time in which it has to act. An antiseptic if used in sufficient concentration and allowed to act sufficiently long may be germicidal.

Q. Now, Doctor, are you testifying that the letters "M. D." indicate to you that it was a preparation made by doctors, is that what I gathered?

(Testimony of Dr. Norman A. David.)

A. Well, it refers in some way—it is like the symbol for prescriptions,—the Rx, and M. D., one looks at that and his first thought would be that it is in some way connected with the Doctors of Medicine.

Q. Isn't it true, Doctor, that the letters M. D. unless accompanied by an individual name, really have no definite meaning? In other words, if you saw the letters "M. D." on a window, without anybody's name, you wouldn't know whether they were selling soap or whether it was a restaurant, but isn't it true that the letters M. D. generally if not always follow the name of some individual?

A. Yes, that may be true, but then we have the symbol which is attached to automobiles used by doctors, physicians and surgeons, which has just the red cross very similar to this, and "M. D." and there is no name there. It is simply the symbol which the medical association supplies to physicians to identify their automobiles as belonging to a physician, and their name isn't on that symbol, but just the registration [230] number of the auto.

Q. When you were in the drug store and saw this can of M. D. Medicated Douche Powder, you are not testifying that it came to your mind from merely observing it on the shelf, that there was a doctor connected with that product?

A. Well, naturally I knew better, as I have stated before, but if a doctor was connected with the product, he was not what we would call reputable or ethical.

(Testimony of Dr. Norman A. David.)

Q. Are you acquainted with M. D. Toilet Tissue?

A. I have heard of that, and the symbol used here is very similar.

Q. And that didn't indicate to you that it was a doctor's prescription, did it? A. No.

Q. Have you ever heard of M. D. Sanitary Napkins? A. No, I have not heard of those.

Q. Are you acquainted with the Hand Books of Obstetrics and Gynecology edited by Doctors Joseph B. Delee and J. B. Greenhill?

A. No, I am not, but I am acquainted with Dr. Joseph B. Delee. My wife worked with him as a trained nurse a number of weeks.

Q. Most of your profession are acquainted with him?

A. Yes, he is one of the leading obstetricians and gynecologists in the country.

Q. I am going to call your attention to a statement made by [231] Dr. Joseph B. Delee in his Year Book of 1937, at page 319 and page 320, and I will just hand you the book and let you read it for yourself.

Q. This is not by Dr. Delee, it is by Dr. Greenhill, whom I don't know. It is edited also by Dr. Delee. He edited the material up to page 303, Gynecology, and the discussion on that subject is edited by Dr. J. B. Greenhill who is Professor of Obstetrics and Gynecology at Loyola Medical School in Chicago, so that statement is not by Delee. Greenhill, I don't know.

(Testimony of Dr. Norman A. David.)

Q. Read the statement and see if it will assist you in answering the question. A. Yes.

Q. Now, Doctor, in view of the statement contained in this book, which I have just shown to you and which you have read, is it not reasonable to believe that a powder similar to Medicated Douche Powder is harmless?

A. The particular powder there did not include Oxyquinaline Sulphate. My objection is against Oxyquinaline Sulphate used promiscuously, we will say—not on the prescription of a physician.

Q. Well, would you say that the use of one gram to one pound of powder of Oxyquinaline Sulphate is particularly harmful?

A. The statement “particularly harmful”, not if it is not used too frequently, and if the person is not sensitive to Oxyquinaline Sulphate. I might add that Oxyquinaline Sulphate [232] is very similar to quinine. Most lay people know that quinine in some people produces very serious toxic reactions.

Q. Are you familiar with the statement in the United States Dispensatory—Wood-LaWall, 22 Edition, page 1505, which reads as follows:

“As a bacteriostatic—as a vaginal douche—as an antiseptic in various conditions such as vaginitis there is much evidence of its value”—

this of course is relating to Oxyquinaline Sulphate—

“harmless to mucous membrane, can be used in almost any concentration as a germicidal, vaginal douche solution 1 to 1000—”

(Testimony of Dr. Norman A. David.)

Mr. Rhodes: I object to the statement based on the statement of the attorney. If that statement is made in the authority referred to, the authority should be produced and the doctor be permitted to examine the authority.

Mr. Levinson: I asked if he was familiar with it.

Trial Examiner Reeves: Objection overruled.

A. I may say that Dr. LaWall is a Pharmacist, and Dr. H. B. Wood is also a Pharmacist, I am not sure he is a Doctor of Medicine. Therefore, I don't think either of them would be qualified to make any statement on their own authority or experience as to the safety of Oxyquinaline Sulphate. They have incorporated data which has been published elsewhere in the Dispensatory.

Q. (Mr. Levinson): Will you just answer this one question, [233] Doctor: Is it your testimony that the use by a woman of Medicated Douche Powder such as we have here in front of you is or is not harmful if used by the average woman?

A. I have already stated that under certain conditions when its use is not watched by a physician, that it may possibly be harmful due to systemic absorption, or due to sensitivity which is something we can't explain on the part of the patient. Otherwise, in the majority of individuals it would be harmless.

Q. Is it your testimony that all douche preparations used by women should be prescribed by a physician?

(Testimony of Dr. Norman A. David.)

A. Yes, it is, because there are various conditions which require various medicines—medication.

Q. And it is your testimony that the general use of medicated douche powder without a prescription is least desirable?

A. Without prescription, is undesirable.

Redirect Examination

By Mr. Rhodes:

Q. Now, Doctor, you were asked on cross examination with respect to the impression conveyed by the use of the letters "M.D." variously used irrespective of the name of the physician in connection therewith. I ask you with respect to the use of "M.D." together with the cross and the picture of a nurse on the particular product in discussion, Medicated Douche Powder, and ask you if that conveys to your mind a definite impression [234] from what the isolated use of the letters "M.D." might convey?

A. Yes, "M.D." alone would refer to a physician, that would be my first thought. Now, naturally when I would see this product, I would think it was made by the people who make the "M.D. Toilet Paper", it looks like the same thing, and my frank reaction to seeing this the first time was that this was a preparation which is trying to appeal to the lay person. Now, I am stating this as a physician. I knew that no physician was endorsing it, and naturally, as I interpreted it, my intelligent reaction to it was that it was just a method of advertising and appealing to the lay people who through

(Testimony of Dr. Norman A. David.)

ignorance may think it was endorsed by physicians. Now, that is actually what I thought. I didn't think—I don't know yet—whether or not the formula has been devised by a physician, but the inference is that it has the backing of the medical profession, and at first sight, it looks like the label I have seen on M. D. Toilet Paper, and I thought possibly it was made by the same company, just through what knowledge I have of the advertising that has been used.

Q. My question was with respect to the use of the letters "M.D." as they are used here in connection with the picture of the nurse and the cross, representing the cross used by the Red Cross, whether that would convey to the mind a different impression, a stronger impression, that it was endorsed or approved by the medical profession than if the letters "M.D." [235] stood alone?

A. Oh, yes, indeed, I think the nurse and the cross there, one would infer that it was more closely connected to the medical profession than just seeing "M. D." alone [236]

DR. G. CARL RIENHART,

was thereupon called as a witness on behalf of the Respondent, and being first duly sworn, testified as follows:

Direct Examination

By Mr. Levinson:

Q. State your full name?

(Testimony of Dr. G. Carl Rienhart.)

A. G. Carl Rienhart.

Q. What is your profession?

A. Physician and surgeon.

Q. Where do you maintain your office?

A. Oregon Building.

Q. Portland, Oregon? [240] A. Yes.

Q. How long have you been engaged in your profession? A. 26 years.

Q. What school were you graduated from?

A. University of Oregon.

Q. Have you had any post graduate work or any other work besides your academic training?

A. No post graduate.

Q. And what specialty do you follow?

A. Urology.

Q. Is that the same as gynecology?

A. Well, not the same; it is along that line,—gynecology is females.

Q. Has to do with female disorders?

A. Yes, sir.

Q. Now, Doctor, in the course of your professional work, have you had occasion to come across a product known as M. D. Medicated Douche Powder? A. I have.

Q. And have you in connection with your work had occasion to use that particular product?

A. I have.

Q. And can you tell us your experience in the use of this product, what you have done with it?

A. Well, with the average female coming into the office, if [241] they had leukorrhea, the whites so-called—nothing serious—we generally advise

(Testimony of Dr. G. Carl Rienhart.)

some cleansing douche powder, and tell them to use it once or twice a week for general cleanliness.

Q. And in connection with that recommendation, have you referred them to any particular products?

A. They generally ask the name of a product to use. There are several on the market, and being accustomed to the M.D., I naturally tell them to get the M. D. Douche Powder.

Q. Have you had any complaints from any of your patients as a result of their using this particular product?

A. I have not.

Q. Now this product is packed by Stanley Drug Products, Inc. Are you interested in that?

A. I am not.

Mr. Levinson: I believe that is all.

Cross Examination

By Mr. Rhodes:

Q. You say as I understand you, Doctor, that in mild cases you recommend that the patient use this product?

A. Yes.

Q. Do you differentiate between mild cases and other cases?

A. Well, specific cases such as *Trichomonas* and gonorrhea require more powerful treatment.

Q. Would that also be true of the use of a powder for the prevention of conception? [242]

A. I would rather think so. I never thought of using this as a preventative for conception. I don't think there is any powder that will prevent conception absolutely.

DAVID BERRY CHARLTON

was thereupon called as a witness on behalf of the Respondent, and testified as follows, being first duly sworn:

Direct Examination

By Mr. Levinson:

Q. Give your full name to the reporter, please?

A. David Berry Charlton.

Q. What is your profession?

A. I am a Bacteriologist, operating a chemical laboratory.

Q. Where? A. In Portland.

Q. What has been your schooling? [243]

A. I took my undergraduate work in chemistry for a Bachelor's Degree and Master's Degree in Bacteriology and Chemistry, and my Ph.D. in Bacteriology and Chemistry.

Q. In what schools?

A. Undergraduate work at the University of British Columbia, Master's at Cornell and Doctor's at Iowa State.

Q. What has been your professional work?

A. I worked in the Health Department of the City of Portland from 1926 to 1928, and have been teaching at Oregon State College for about 4 years, a course in Bacteriology, and since 1934, have been operating a chemical manufacturing laboratory in Portland.

Q. You are now engaged in operating that laboratory? A. Yes.

Q. Did you at the request of the Stanley Drug

(Testimony of David Berry Charlton.)

Products, Inc. make certain tests of their product know as M.D. Medicated Douche Powder?

A. Yes, I have.

Q. Tell us what those tests were.

A. The tests I ran for them was the usual test method recommended or published by the Food & Drug Administration to determine whether such things as salves, ointments and so forth, have any bacterial static substance in them. This method was used in testing the Medicated Douche Powder.

Q. What has been the result of your test in so far as [244] Medicated Douche Powder as being antiseptic?

A. We found that the Medicated Douche Powder used in the dilution recommended on the label—we tried dilutions of one teaspoon to a pint and one teaspoon to a quart—but this particular solution had the ability to restrain the growth of the test organism under the conditions of this test and consequently we reported that it had a bacterial static or germ inhibiting substance in it, and we indicated the depth of the immersion zone around the particular outer cup, as they call it, in the method, which gives some idea whether it is weakly or strongly antiseptic or bacterial static. [245]

CHRIS HALSTON

was thereupon called as a witness on behalf of Respondent, and being first duly sworn, testified as follows:

Direct Examination

By Mr. Levinson:

Q. Just tell us your full name.

A. Chris Halston.

Q. What is your occupation?

A. Druggist.

Q. You have a drugstore?

A. Heathman Hotel Drug Store.

Q. Here in Portland, Oregon? A. Yes.

Q. How long have you been engaged as a druggist? A. For 20 years.

Q. You are a graduate of what school?

A. University of Washington.

Q. And you personally operate the store yourself?

A. Yes, sir, I have three of them.

Q. Mr. Halston, showing you a can of what is labelled M. D. [246] Medicated Douche Powder, state if you have ever seen similar cans?

A. Yes, I have.

Trial Examiner Reeves: Mention the exhibit number, please.

Mr. Levinson: Oh, pardon me, this is Commission's Exhibit 51.

By Mr. Levinson:

Q. Do you carry in your stores a supply of that product? A. Yes, sir.

(Testimony of Chris Halston.)

Q. Calling your special attention to the letters "M.D.", will you tell us what that means, if you know?

A. Medicated Douche Powder.

Q. When customers come in the store and ask for a douche powder, do they ask for them by various trade names?

A. Yes, they do.

Q. And have you had any difficulty with persons coming in and asking for Medicated Douche Powder complaining that it is not prescribed by a doctor,—did anybody come in and ask you if it was prescribed by physicians, or anything like that?

A. They don't ask for those things. They usually call for it by name, they say "I want a package of M.D. Powder", and they know what they want.

Q. Have you ever had occasion to sell a douche powder on prescription? [247]

A. Yes.

Q. It is common?

A. Not very often—well, it is common—I wouldn't say—at one time or another, they are recommended by doctors, then they come to the drugstore without the prescription.

Q. What is the predominance of requests on prescriptions for people who just come in and ask for a certain kind of powder?

A. The majority will come in and ask for a certain powder by name.

Q. Now, do you, in your business, regard the letters "M.D." on the can as meaning anything but the trade name?

A. No, we don't. We just consider it as the name of it.

(Testimony of Chris Halston.)

Q. Have you ever seen the letters "M.D." used on any other article of merchandise?

A. Yes, I have.

Q. Can you name some of them?

A. Toilet tissue.

Mr. Levinson: You may inquire.

Mr. Rhodes: No questions.

Trial Examiner Reeves: The witness is excused.

(Witness excused)

Mr. Levinson: If your Honor please, the respondent has three more druggists who are actively engaged in the drug business in the State of Oregon, who if called to testify in this matter, would testify substantially to the same effect as [248] the witness who has just testified, to-wit: Chris Halston, and we ask that in view of the fact that their testimony would merely be cumulative, that we will not be required to call those three druggists.

Mr. Rhodes: It is agreed by counsel for the Commission that the witnesses, if called by the respondent, would testify to the same effect as the witness who just left the stand, namely Mr. Halston, and therefore, calling them as witnesses and having them testify is dispensed with.

Trial Examiner Reeves: As I understand it, it is agreed between counsel that if these additional witnesses were called, they would give testimony to the same general effect as that given by the witness Chris Halston.

MRS. ESTELLE PENDLETON

was thereupon called as a witness on behalf of the Respondent, and being first duly sworn, testified as follows:

Direct Examination

By Mr. Levinson:

Q. Just tell us your full name, please.

A. Estelle Pendleton.

Q. May I ask where you live? [249]

A. 7805 Northeast Sandy.

Q. In Portland, Oregon? A. Yes.

Q. How long have you lived in Portland?

A. About 17 years.

Q. What is Mr. Pendleton's occupation?

A. Post office clerk.

Q. A post office clerk for the United States Government? A. Yes.

Q. Do you have any children, Mrs. Pendleton?

A. No, sir.

Q. I am showing you, Mrs. Pendleton, a can which is entitled as Commission's Exhibit 51, and which is a product of the Stanley Drug Products, Inc., and called "M.D. Medicated Douche Powder", and ask you if you ever saw a similar can of that?

A. Yes, sir.

Q. Where have you seen that product?

A. Drugstores.

Q. Have you ever purchased a can of that product? A. Yes.

Q. Will you tell us how you happened to purchase that particular can? I mean, was it recommended to you?

(Testimony of Estelle Pendleton.)

A. Yes, I had samples of it first given to me, and I tried the samples, and I liked it very much, so I started using it.

Q. Did you ever show it to your physician or anything like [250] that?

A. No, but I asked him about it.

Q. No objection was found to your using it?

A. No, he said it was very good. I told him what I had been using before.

Q. Have you found it dependable?

A. Very much so.

Q. Calling your special attention, Mrs. Pendleton, to the letters "M.D." on the top part of the can, what does that indicate to you?

A. Medicated Douche Powder, I would say.

Q. Did it ever indicate anything else besides that?

A. No, I thought that is what it meant.

Q. Do you know of any other douche powders on the market?

A. I used to use Takara before that.

Q. In other words, M.D. indicates it is a trademark?

A. That's what I thought it was.

Q. Does it indicate to you that it is a prescription of a doctor? A. No.

Q. Have you ever seen the letters "M.D." used on any other product?

A. Yes, I have on toilet pape.

Q. Any other product besides that?

(Testimony of Estelle Pendleton.)

A. Not that I can recall. That is the only thing, toilet paper [251] and M.D.

Q. Does the fact, Mrs. Pendleton, the product has the initials M divided by a cross in which there is a drawing of a nurse, then the letter D tend to lead you to believe that it is a product issued by doctors?

A. No, I never connected the two together.

Q. It is just common to most medical products, is that it? A. That's what I thought.

Q. In your experience as a housewife, naturally you have talked with other women about things like this? A. Yes, and recommended it to them.

Q. Do you have any interest in the Stanley Drug Products, Inc.? A. No, sir.

Q. But you have found it a very fine product?

A. I like it very much.

Q. And you have recommended it to your friends? A. Yes, I have, to many of them.

Mr. Levinson: That is all.

Cross Examination

By Mr. Rhodes:

Q. What was the purpose for which you used it?

A. Pardon?

Q. What was the purpose for which you used it? A. A douche—sanitary. [252]

MISS ROSE AGNES MURPHY

was thereupon called as a witness on behalf of the Respondent, and being first duly sworn, testified as follows:

Direct Examination

By Mr. Levinson:

Q. Tell us your name, please.

A. Rose Agnes Murphy.

Q. Where do you live?

A. 5323 Northeast 14th Place.

Q. And that is here in Portland?

A. Yes, Portland.

Q. How long have you lived here in Portland?

A. 38 years.

Q. Do you have a family?

A. No, I am single.

Q. Is Mr. Murphy employed?

A. No, I am single,—I am by myself.

Q. Is it Miss? A. Miss.

Q. Are you engaged in any occupation?

A. Nursemaid. [253]

Q. Practical?

A. Well, just carrying for children as a nursemaid, caring for children around the neighborhood.

Q. Now, Miss Murphy, will you please look at Commission's Exhibit 51 which is a can of Medicated Douche Powder and state if you have ever seen a similar product?

A. No, nothing but that.

Q. You have seen this particular product?

A. Oh, yes, I have seen that a good many times.

Q. Where have you had a chance to see it?

(Testimony of Miss Rose Agnes Murphy.)

A. In drugstores and my own home.

Q. Are you a purchaser of this product?

A. I am.

Q. How long have you used such a product?

A. Oh, five years, I would judge, as near as I can remember.

Q. Have you had satisfactory results?

A. Very satisfactory results.

Q. Do the letters "M. D." mean anything to you outside of what you see on the can?

A. No, just Medicated Douche.

Q. Did it ever mean to you that it meant Medical Doctor?

A. No, I never thought of it in that way at all. I just figured it meant what it says on the can,—“Medicated Douche”.

Q. Just a trade-mark?

A. Just a trade-mark, yes. [254]

Q. Have you in your travels around the city or visiting other women, had occasion to discuss a product similar to this? I mean did you ever discuss what kind of douche powder women used?

A. Yes, a good many times.

Q. Have they ever mentioned this particular product?

A. Yes, I know quite a few people who use it—very dependable and very satisfactory.

Q. Have they ever commented on the fact that it was prescribed by doctors?

A. No, nobody I know ever seemed to feel that way.

(Testimony of Miss Rose Agnes Murphy.)

Q. Have you ever been misled by the letters "M. D."? A. No.

Q. You just thought the letters "M. D." were a trademark? A. That's all.

Q. Now, the fact that it has a nurse in the center of the letters, does that indicate anything to you?

A. No, no more than it was just a natural trade picture on the product.

Mr. Levinson: I believe that is all.

Cross Examination

By Mr. Rhodes:

Q. You say you are not married?

A. I am not married.

Q. Were you ever married? [255] A. No.

Q. What was the purpose for which you used this douche? A. Douche.

Q. What?

A. A douche. I used it for a douche powder.

Q. Why did you use it for a douche powder?

A. Well, I used it at my doctor's orders. He didn't say this special one, but he told me to use one, and I asked if this was all right, and he said "yes".

Q. Did your doctor say why you should use it?

A. Just because I had a natural, very common woman's ailment is all, and he thought it would be helpful.

Q. Did you have him diagnose your case to tell you what the ailment was?

A. Yes, I certainly did.

Q. What was the ailment?

(Testimony of Miss Rose Agnes Murphy.)

A. Leukorrhea.

Q. You weren't suffering from any venereal disease, were you? A. Absolutely not.

Q. You weren't afraid of conception, were you?

A. Absolutely not.

Q. And you didn't use it for either of those purposes, did you? A. Absolutely not.

Q. You used it wholly as a sanitary measure? [256] A. Sanitary measure. [257]

DR. ALBERT HOLMAN

was thereupon called as a witness for the Commission, and after being duly sworn, testified as follows:

Direct Examination

By Mr. Rhodes:

Q. Will you give your full name to the reporter, please? A. Dr. Albert Holman.

Q. Where do you live?

A. I live in Portland and practice in 415 Stevens Building. [259]

Q. Will you give the history of your educational background?

A. I specialize in obstetrics and gynecology and have specialized in that since 1924, when I started to practice. I am a graduate of the University of Oregon Medical School, have three years post graduate work at Cleveland in the Cleveland Clinic and

(Testimony of Dr. Albert Holman.)

Cleveland Maternity Hospital and Lakeside Hospital.

Q. Dr. Holman, this is the case in which the Federal Trade Commission has brought action against the Stanley Laboratories, Inc. and Edward Bachman, an individual, trading as Stillman Products Company and as Stanley Laboratories.

The Commission charges the respondent with making certain representations in connection with the sale of products sold by them. The charges are set out in the Commission's complaint, the indented paragraphs found in the mimeographed copy which I hand you at pages 2 and 3. Will you please examine that?

A. Yes, sir. I would rather do these one at a time, if I might. That is, discuss Medicated Douche Powder before I remark about Contra-Jel.

Q. Yes, I would be glad to have you do so, but first, I would like you to have in mind what the record shows is the formula for the powder. I have a typewritten memorandum which shows that, which I hand you. It shows that Medicated Douche Powder contains oil of white thyme, eucalyptol, phenol crystals, oil of peppermint, powdered potassium of alum, zinc sulphate [260] powder USB, boric acid powder, Oxyquinaline Sulphate 1-1000.

Trial Examiner Reeves: Off the record.

(Discussion was had off the record.)

Trial Examiner Reeves: On the record.

Q. (Mr. Rhodes, continuing) Doctor, will you take up the several representations as shown by the complaint, and discuss them? A. Yes, sir.

(Testimony of Dr. Albert Holman.)

In the first place, as I read this, I take these up as I see them, one by one. It alleges it is a dependable douche to assure personal hygiene.

Q. You are referring now to the Douche Powder?

A. Yes. There is absolutely no dependable douche for feminine hygiene. As I understand it, by feminine hygiene is meant here two things, (1) to prevent conception, and the other as a bacterial static agent, one which will kill bacteria in the vagina, and in that way limit or prevent infection, particularly of venereal diseases. At least, that is the way most women understand it.

I can say categorically that there is absolutely no dependable douche of any type, and certainly a douche which contains this formula which is made up of volatile oils,—the only real antiseptic agent in this particular douche powder is the phenol crystals,—carbolic acid crystals.

Now, its bacterial static power, its antiseptic power, would [261] depend entirely on the amount of carbolic acid, and one can state categorically that no germicide of any character, whether it is a douche or a powder or what it is used as will kill or limit the growth of bacteria unless it is so strong that it will also damage human tissue, particularly mucous membrane. I notice on the can that it is to be used 1 teaspoonful to a quart of water.

I would say that in that proportion, it would have absolutely no bactericidal power.

True, Oxyquinoline Sulphate has a spermaticidal

(Testimony of Dr. Albert Holman.)

power—that is, it will kill spermatozoa if applied properly and in direct concentration, but when you have a 1-1000 proportion in a powder, and then take one teaspoonful of that powder and put it to a quart of water, your concentration of Oxyquinoline Sulphate which is the only spermaticidal agent in this powder, you might as well be using plain water, except that it has a certain odor.

As far as this douche is concerned, towards soothing or healing vaginal mucosa, that is “hooey”. That is a thing that makes practically every scientific gynecologist get up in arms, when he sees that sort of advertising, because it isn’t true.

If a douche powder, or any agent used as a douche, is strong enough to have any effect on the mucous membrane at all, it irritates it. [262]

We see in the course of our work, many many discharges in women that we feel come from using a douche powder which has these various volatile oils and phenol.

The point I want to make is this: that the lining of the vagina and the covering of the cervix is exactly the same, it is the same type of mucous membrane, as the conjunctiva which covers your eyeball and the inner portions of your eyelid, and you wouldn’t think of using a solution like this in your eye.

Now, the reason is that the eye has a great many more sensory nerve endings in it than there are in the vagina, but there is just as much irritation to the vaginal mucosa from this sort of thing as there

(Testimony of Dr. Albert Holman.)

is in the eye. It would have absolutely no effect on cuts, sores or burns. In the first place, all medical thought is now not to use this sort of thing, any type of thing like this, on a cut, or sore or burn. Burns are treated in an entirely different manner. All this could do to a cut, sore or burn, is to do it damage. You wouldn't put this sort of thing on a burn. If someone came in my office for treatment of a burn or a bad cut, I wouldn't think of putting this kind of powder in it. It just isn't the sort of thing one would use.

The next paragraph, it says, "a germicide." Well, it is obvious to anyone who knows anything about bacteriology that it just isn't unless there is an enormous amount of [263] phenol in it, because when you consider that this whole powder is diluted one teaspoonful into a quart,—now, in a *court*, there are about 130 teaspoonfuls in a quart—so that you can see whatever is in this is diluted 130 times when it is applied as a douche.

Again it says "Effective in combatting any form of bacteria". Well, what do you mean by combatting? That is, if you mean the limiting of the growth thereof or killing them, I would be willing to state that practically any type of bacteria, any of the pathogenic micro-organisms would grow in this solution. That is, if you were to take and implant staphylococci or streptococci—any of the pathogenic micro-organisms—on a culture media and color them with a solution of this, one teaspoonful of this powder to a quart of water, you would go

(Testimony of Dr. Albert Holman.)

right ahead and get an active growth and be able to transplant it.

“In relieving women of fatigue and the annoying discharge often caused by all day standing”. All day standing, in the first place, doesn’t ever cause a discharge. If the vaginal mucosa and the cervical mucosa are normal, there is no discharge other than the perfectly normal slight secretion of mucous from the mucous membrane. If a woman has an erosion of her cervix in connection with *Trichomonas*, this won’t have any effect on it. The only thing this will do is what a douche of plain water will do. It will wash out the vagina but the Medicated [264] Douche Powder doesn’t wash it out, the water washes it out, and the woman isn’t conscious of any more discharge until the vagina fills up and starts to run out again.

Does that answer your questions?

Q. Well, further with respect to the advertisements and representations made by the respondent as shown on Commission’s Exhibit 51, you will notice, Doctor, that the letter M separated by a cross and a picture of a nurse and used together with the letter D, at the opposite end, I will ask you to state your reaction with respect to the representation made there, whether or not it indicates that some doctor or medical science has approved it?

A. Well, to me it does that. I think a person that sees that sort of thing, thinks that it is recommended by the medical profession, and in the last few years, we physicians have resented terribly

(Testimony of Dr. Albert Holman.)

everything about this M.D. business, and I would like to know if any doctor has endorsed this, and who the doctors are, and what they know about gynecology; if they have had any particular experience in the field they wouldn't endorse it, and it certainly hasn't the authorization or approval of doctors that I know anything about. [265]

Q. (Mr. Rhodes) Doctor, will you take up the product Contra-Jel, and state in your opinion as a practitioner and as a result of your contact with the public and treatment of the public, just exactly what your reaction is as to what, or what their reaction would be upon reading that.

A. Well, I shall discuss the first sentence in the indented paragraph at the top of page 3—"Contra-Jel is the highest quality vaginal antiseptic in jelly form." The crux of that statement lies in the statement "vaginal antiseptic". The average lay woman feels that any—— [266]

A. The average woman in my practice in my office when this subject has come up, and believe me, please, it comes up many many times—feels that if any medicine, douche or jelly is a vaginal antiseptic, it protects her both against venereal disease and pregnancy. Now, there are two distinct types of things. One is a bacteria and the other is a spermatozoa which comes from the male and fertilizes the egg, and an agent which is spermaticidal,—that is, which will kill spermatozoa is not of necessity bactericidal, because the sperma-

(Testimony of Dr. Albert Holman.)

tozoa is much easier to kill. You can kill spermatozoa by drying, but a great many of the bacteria cannot be killed by drying. You can kill spermatozoa by increasing the temperature of that spermatozoa only a few degrees, whereas many bacteria cannot be killed by boiling for a long period of time, so that an agent which is bactericidal is not necessarily spermaticidal and vice versa. The reason I say that is because I have women coming in my office suffering from certain symptoms which lead me to believe they have gonorrhea. I would take a slide and find that the woman had gonorrhea and inform her so, and she would say, "Doctor, I can't have gonorrhea, because I used a vaginal [267] prophylactic, I used douche powder or contraceptive jelly or whatnot." In other words, the woman has a false sense of security when she uses that type of thing. Unless it is explained to this woman, if you want a contraceptive, use such and such, it has no bactericidal power, it won't kill infection of the vagina or anything, but if used properly under proper conditions this particular contraceptive—diaphragms, or whatever it might be—will protect you in maybe 70 or 80 per cent. of cases, there is absolutely no contraceptive device excepting a rubber condom or a rubber cervix cap, which is anywhere like 100 per cent. as far as I know, because I have delivered babies after every type of contraceptive had been used, and there just isn't anything. A douche is the least preventative. Contraceptive jelly, and

(Testimony of Dr. Albert Holman.)

remember there are all kinds and of all consistencies, is the next safe on the upward step, then the protective diaphragm is the next. It is not 100 per cent., but it is the next, and the rubber condom for the man is the safest, but aside from the rubber condoms, there is no 100 per cent. safe contraceptive, so when it says here, "It is the highest quality vaginal antiseptic", it just isn't an antiseptic. [268]

"Contra-Jel is harmless, non-irritating, antiseptic and beneficial." It may be harmless and it may be non-irritating I don't know and wouldn't want to state, but I can state that it is not a vaginal antiseptic.

Q. Now, Doctor, with respect to the M. D. Supercones, you have before you the allegations in the complaint and you have before you the formula for that. Will you examine again the allegations in the complaint with respect to the advertisements or representations made by the respondent and state what your opinion is as to those?

A. "They are stable and do not lose their antiseptic strength." I couldn't say, because time would be the only thing to prove that.

"A powerful yet non-irritating antiseptic." Well, again, they are not antiseptic.

"Supercones remain in effective contact many hours". I take it that these Supercones from this are used as a prophylactic against pregnancy and against venereal disease. We know that any vaginal suppository which is what a Supercone

(Testimony of Dr. Albert Holman.)

is, and there are many of them on the market, that they are the least effective.

When I was speaking about contraceptives a while ago, I left vaginal suppositories out, because they are even much less effective than a douche, for this reason. May I draw a picture [269] on here? I am thinking in terms of a physician who understands anatomy.

A. (Continuing) The reason I drew a picture, when a vaginal suppository or a Supercone or any other is inserted into the vagina, ordinarily the women just put them in haphazardly. I know that the average woman has very little idea of the construction of her vagina or of her cervix or of her uterus I know that, because I have discussed it with hundreds, so that by pushing such a thing as this into the vagina, it may be here or they may push it away back here, but it depends entirely on the melting point and viscosity or surface tension of the cocoa butter whether it will diffuse throughout the vagina, or whether it stays in one place, and the rate at which it diffuses, so that if a woman puts one of these in her vagina as she is supposed to do before intercourse, it depends on the melting point of that particular cocoa butter, and remember that these suppositories,—I mean vaginal Supercones—vary 10 to 15 degrees in their melting points, because ordinarily when they are manufactured, the cocoa butter is put into a mold and no attention is paid to the melting point.

(Testimony of Dr. Albert Holman.)

If this particular suppository has a low melting point, and it is put in the vagina, it might have to be in there three quarters of an hour before it will become fluid enough [270] to cover the wall of the vagina if there is enough in this particular sized thing to cover the wall of the vagina.

Now, remember that the vagina when spread out is a big thing. The vulva is a compressed tube, but when you realize when it is entirely spread out it spreads out large enough so that a baby's head can come down without tearing it until you get clear down to the outside, you can see that this thing that you ordinarily picture as about twice the size of a finger in a glove or three times, maybe, is really a great, big cavity.

All right, you take this or a contraceptive jelly or anything, it will cover this, but when a woman changes position or spreads out, there are a lot of areas that haven't been covered by that, you see. The mechanics of all contraceptives are like that, that is why we say they are not particularly safe. This sort of thing is least safe.

Q. Referring to the Contra-Jel?

A. No, to vaginal Supercones, depending on where this is applied and the physical character or make-up of that particular suppository would depend on whether it had any contraceptive value, or just how much. But one could absolutely categorically say that it is not a safe contraceptive, and by no stretch of the imagination could it be called a vaginal antiseptic.

(Testimony of Dr. Albert Holman.)

Q. Now, with respect to the product Femeze, there is in [271] evidence, Doctor, Commission's Exhibits 47A and 47B, a carton in which the product is contained, and a folder with descriptive matter on it with respect to the use of it.

A. I read that while I was waiting here. That is pure bunk, that's all there is to it. All this is is a preparation of acetphenetidin and the effect on menstrual cramps or anything of that sort is absolutely nil. They make the statement in here, "It does not merely deaden your nerves with drugs or narcotics to stop the pain". That is all that it does, and it would have the same effect on a headache or a pain in the shoulder as it does on menstrual cramps.

Q. Would it or would it not relieve the cause?

A. No, absolutely not. There are some drugs which are anti-spasmodics which cause relief of contraction of the muscle. Belladonna is one, and adrenalin is another when used by injection, all the various opiates like morphine will relieve smooth muscle contraction, but acetphenetidin is not one as far as I know recognized in pharmacology.

I may be in error about that, but I don't think so. If this contained a certain amount of atropin, tincture of Belladonna, or something of that sort, it would. It wouldn't get at the cause, it would merely relieve the pain due to the spasm of the smooth muscles, but you must remember that dysmenorrhea is not that simple a thing. Ordinarily dysmenorrhea,—that is painful menstruation—has

(Testimony of Dr. Albert Holman.)

definite [272] causes. It isn't something that comes out of a clear sky, and it doesn't come because the musculature of the womb is too tight. If you realize that the uterus is a sac made up of smooth muscles with a canal running through the center—this is a side view of it—if you look from the front, it is roughly that sort of an arrangement (Doctor indicates by drawing diagram). This is the canal, and these are the tubes. It is bent in that position, but we are looking at it in that way. Ordinarily, dysmenorrhea comes from one of three main sources, either due to infection, due to congenital malformation, as a stricture, a narrowing, a tightening, which is a scar tissue thing, it isn't that the muscle is too tight, and there is a very definite reason for it. Either there is a stricture there which impedes the flow of blood, or the uterus instead of being in its normal antverted position, it is back like that in what we call a retroverted position, so the uterus fills up from blood and has to empty this way, and the muscle contracts to force the blood out, and we visualize these very often by X-ray, by the injection of an iodized oil and we can see these inter-uterine polyps, they are small growths, and hang down in the uterus and obstruct this canal. Those are the three most common causes of dysmenorrhea. There are many others. Worry of a woman—well, what I am trying to say, there are many scientific reasons for dysmenorrhea, but if you take all women who suffer from painful menstua-

(Testimony of Dr. Albert Holman.)

• tion [273] and lump them into a group, the three I have told you would cover probably 85 per cent. of all dysmenorrhea. Now, such a thing as Femeze won't get at the cause of the dysmenorrhea at all. It won't replace the uterus, cure the stricture, or remove the cause.

Q. Doctor, will you state, please, from your practice and experience, and your knowledge of human anatomy whether or not the layman is capable of diagnosing a complaint from which he feels he is suffering?

A. Now, I would say that they can't. I would say, strangely enough, when a doctor gets sick, he can't.

It is almost impossible for any individual unless he has a broken leg and sees that the leg is broken, or something like that, but for the average woman to determine why she is suffering from the symptoms she has given, or the ailment, let us say, from a vaginal discharge, or let us say a backache or dysmenorrhea, it is impossible for the individual to tell, because, in the first place, she has to interpret her own symptoms without knowing what organs she has even to be involved. If you ask the ordinary individual "Where is your womb?" she doesn't know the difference between her womb and her vagina. If you ask about her tubes, or ovaries, many women come into my office and say, "I have a sore ovary." They just know they have two ovaries, one on each side, so that any pain is ovarian. Any discharge, most women

(Testimony of Dr. Albert Holman.)

think is due to fatigue or overwork [274] or something of that sort, when we know that plays no part at all. The reason that doctors, particularly with regard to female complaints, are so against self-diagnosis and self-treatment, is because we learn by bitter experience that women will treat the beginning symptoms of cancer of the uterus or cancer of the cervix which start, the first thing, when a woman notices a discharge, then from time to time she will begin to notice discharges, blood maybe one day, and another a month from now, and that will get a little more profuse. The average woman has a great many reasons in her mind why she is suffering from this, and the reason doctors are so much against self-medication is because a woman will go from one douche powder, or one thing they can instill themselves to another until the beginning cancer has become inoperable.

We see them all the time, and had we had the chance to see that woman six months before, her life would have been saved, but because she has gone ahead and treated herself so long, the metastasis has occurred and the case is inoperable, and the same way with regard to infections of the vagina, for instance, venereal infections, a woman will have a discharge and she will think it is due to overwork or standing on her feet or whatnot, and she will go along trying to treat that herself with a douche, and instead of curing it, she has spread it, and by the time the doctor sees her, she has her tubes all inflamed and many times they have to be re-

(Testimony of Dr. Albert Holman.)

moved, where if she had gone to [275] a doctor in the first place, and he could have treated her correctly, she wouldn't have had that trouble, so the reason the medical profession as a whole is against self medication is that the patient can't tell what is wrong and does herself many times irreparable damage by trying to treat herself.

Q. By the delay? A. By the delay.

Cross Examination

By Mr. Levinson:

Q. Before being called as a witness in this case, had you ever heard of M.D. Medicated Douche Powder?

A. I had seen it in the windows down at the Post Office Pharmacy when I have stopped there to mail letters and I thought it was an awful lot of nerve.

Q. When you saw the "M.D." it incensed you because you are an M.D. and that can is not?

A. It didn't incense me. It just seemed to me it was very poor taste.

Q. Have you ever seen the letters M.D. used on any other products?

A. I can't recall whether I have or not.

Q. Have you ever seen them used on toilet paper?

A. I don't know. I may have. Quite possibly I have.

Q. Have you ever seen them used on sanitary napkins? [276]

(Testimony of Dr. Albert Holman.)

A. Yes, you bet I have.

Q. And of course, you know that doctors don't prescribe things like that? A. Yes.

Q. Now, the letters "M.D." in and of themselves without anything with them, just the letters "M.D." even divided by a nurse, does that indicate to you that it is a medical term?

A. It wouldn't indicate to me it is a medical term, because I know darned well it isn't. Does that answer it?

Q. Now, the time that you saw this particular product is when you saw it in the drug store?

A. Yes.

Q. You know now, I guess, in a general way the formula for this product? A. Yes.

Q. Now, I have here the formula, and I will ask you first, generally, do you have an objection to a woman using a douche powder?

A. Do you say, do I have an objection to it?

Q. Yes.

A. Yes, primarily and per se I advise my patients against douches because douches are not physiological. You don't douche out your nose or your eye or your ear every day, nor your rectum, and the vagina is just as physiologically normal a body cavity as any other body cavity, and I think that I can [277] say this truthfully, that practically every good gynecologist advises his patients against douches rather than to prescribe them to use douches, because we feel they are definitely harmful.

(Testimony of Dr. Albert Holman.)

Q. Would you say a preparation containing boric acid is objectionable as a vaginal douche?

A. I would say categorically that any vaginal douche is not a good thing for the patient to use.

Q. If I should go along and ask you questions about each specific—

A. I would pick out the ones in this that are most objectionable to me, if that is what you are trying to get at.

Q. Would you do that for us, Doctor?

A. Eucalyptol, phenol crystals and the potassium alum, and the zinc sulphate, those are very irritating.

Q. To you, they are objectionable?

A. Yes.

Q. Can you tell us what, in your opinion, is the meaning given by your profession to the word “antiseptic”?

A. It means exactly what it says. “Anti” is against, and “septic” is sepsis,—infection,—it means “against infection”.

Q. Does it mean that the antiseptic has to kill germs?

A. That is the construction that I would certainly put on the word, or I think any other person—antiseptic is against sepsis. [278]

Q. What is the definition given to the word “germicide”?

A. Germicide, to kill germs.

Q. Can a product be antiseptic and not germicidal?

A. I doubt it.

(Testimony of Dr. Albert Holman.)

Q. Your answer is that you doubt there is any difference between the two words?

A. Well, they are not—I would say roughly the two words mean about the same thing. That is, they do to me. I don't know what the definition is in the dictionary.

Q. Are you acquainted with the Year Books of Obstetrics and Gynecology edited by Delee and Greenhill?

A. Yes, I am quoted in them almost every year.

Q. I find on pages 319 and 320——

A. What year is that?

Q. The year book 1937,—a statement which I am going to let you read.

A. All right, and now let me qualify this Year Book. This Year Book is a compendium, an abstract of the various articles which have appeared in the medical literature of that particular year 1937.

Trial Examiner Reeves: Off the record.

(Discussion held off the record.)

Trial Examiner Reeves: On the record.

A. (Continuing): This is purely what it is supposed to be, that is why they call it a Year Book, it is merely an [279] abstract of various articles. He doesn't say what these douches are used for. You asked me to read this?

Q. Yes, I wanted you to familiarize yourself with that particular portion of the book. Now, you have done that?

A. Yes.

(Testimony of Dr. Albert Holman.)

Q. Now, you stated that that is just this man's opinion? A. Yes.

Q. Referring to that man, it is Doctor——

A. Karnagay, the University of Texas School of Medicine.

Q. After all, medicine is just one man's opinion against another's? A. Surely.

Q. Isn't that true? A. Yes.

Q. What you have told us today is your opinion?

A. That's it.

Q. Other doctors may have other opinions, and naturally we are all proud of our opinions, and you have given us your opinion this morning?

A. Yes.

Q. Isn't that true? A. Yes.

Q. Now, according to Dr. Karnagay, he doesn't seem to have any particular objection to the use of douches, does he?

A. The point of this particular article as I see it, is that [280] they try to get a douche of a certain PH used.

Q. Yes, and the purpose of that is to raise the acid condition of person, isn't that true, as distinguished from the alkaline condition?

A. The higher the PH the lower is the acidity.

Q. All right, which is preferable?

A. Well, preferable for what?

Q. For the woman?

A. Well, it doesn't make any particular difference what the acidity of her vagina is as long as she is normal. If she has some particular infection

(Testimony of Dr. Albert Holman.)

which grows best in an alkaline vagina, if you believe in that particular type of treatment, you will try to get that vagina more acid, and conversely, if you have an organism which grows the best in acid, you try to get the vagina more alkaline, if you use this type of treatment. I don't use it, and I don't know anybody among my personal acquaintances who does.

Q. I believe you testified that you recommend against a woman using a douche? A. Yes.

Q. Indiscriminately?

A. Unless there is some very definite reason for it. I prescribe douches at times, but ordinarily advise against them.

Q. Now, at this particular douche powder is harmless and may yet be soothing and cooling like a mouth wash or after shaving [281] lotion, is there any particular objection to a woman using it?

A. If it is harmless? What do you mean by harmless?

Q. Assume a woman enjoys a douche just like a man might enjoy gargling his throat every morning, and it has no effect except to make them feel psychologically better, is there any objection to a douche powder?

A. If it is—let's get this straight—if it has no effect, if that douche powder has no effect, I mean by that, if it has absolutely no irritating effect on the vaginal mucosa, if it has no effect except on that woman's psychology, I certainly have no objection providing she will use water which is clean. The

(Testimony of Dr. Albert Holman.)

reason I advise against douches and douche powder is because the douche powder ordinarily will irritate and because the woman frequently introduces infection merely by taking the douche which wasn't there beforehand, that's all.

Q. But if from a psychological standpoint the effect upon a woman of the use of a douche——

A. If the only effect was absolutely psychologic and had no effect on her vaginal mucosa, I would say of course I don't object.

Q. There would be no objection at all?

A. No.

Q. Like a man using a lotion for after shaving, if it makes him feel better, there would be no objection?

A. I can't see that there is any connection between after- [282] shaving lotion and a douche.

Q. Suppose it was a vaginal douche of just plain water would there be any objection to that?

A. Yes, I advise against it only because of the danger of plain water introducing infection into the cervix, because I have seen it happen.

Q. Now, Doctor, you stressed in your direct examination your objection to persons engaging in what is known as self-medication? A. Yes.

Q. And of course, most doctors are opposed to patients trying to be their own doctor? Most doctors are opposed to a patient taking care of himself medically, isn't that true? A. I imagine.

Q. Because the patients use the wrong cure for——

(Testimony of Dr. Albert Holman.)

A. Because they ordinarily make the wrong diagnosis, and because they know nothing about the cure.

Q. Yes, in other words, you feel that if a patient has any physical ailment, the first place to go is to a doctor?

A. I think so.

Q. And not to a drugstore?

A. I think so.

Q. And you are naturally interested in seeing that a product such as M. D. Medicated Douche Powder is not sold in the drug stores? [283]

A. No, I am not. I don't care whether they sell Medicated Douche Powder or not. I don't care what they sell. That is up to the individual. The only thing I am testifying to is my opinion of this particular advertising. I don't care if they sell ten barrels of that a day, it is nothing to me.

Q. As a doctor, aren't you interested in seeing that women do not use these products?

A. I think they are bad for women, but I certainly am not going to get myself stirred up about it.

Q. As a member of the medical profession, you are not interested in preventing the distribution and sale of douche powders to the public?

A. Not particularly, no.

Q. It makes no difference to you. Well, Doctor, is a douche powder helpful in some or any gynecological conditions?

A. No, a douche powder is not.

Q. Would a douche powder prescribed by a doctor be helpful?

A. I don't think so.

(Testimony of Dr. Albert Holman.)

Q. As I understand your testimony, you are generally opposed to the use of douches?

A. Well, remember—don't get the idea—I don't want the idea conveyed that I have a quarrel with douches, because I haven't. I prescribe them lots of times, but I do think that indiscriminate douching by women causes trouble and it isn't just a matter of what I think. I have a lot of reason for it. [284]
I see these patients.

Redirect Examination

Q. (Mr. Rhodes): Your objection to the use of douche powders then is based upon your experience?

A. Yes.

Q. And it has been brought to your mind that the use of douche powders indiscriminately has delayed the proper treatment for a particular complaint because of the ignorance of the individual?

A. Yes. And let me say this: I taught for many years in medical school, in the Dispensary, and during that length of time, I used to see many, many women, that is, many more than any man could see in his own office. We went up there twice a week and would see anywhere from 40 to 70, and in the old days they used to try to treat certain types of vaginal discharge—remember that discharge is only a symptom—but they used to try to treat the lesions that caused the discharge by all types of medication, applying them with sticks and by a douche and that sort of thing, and they found years ago that that wasn't the way to treat it, and

(Testimony of Dr. Albert Holman.)

that it did harm, so that it has been discarded and it is out. [285]

DR. THOMAS R. MONTGOMERY,

was thereupon called as a witness by the Commission and being first duly sworn, testified as follows:

Direct Examination

By Mr. Rhodes:

Q. Will you give your full name to the reporter?

A. Thomas R. Montgomery.

Q. What is your business, Doctor?

A. I am a Urologist.

Q. Will you state what a Urologist specializes in?

A. A Urologist specializes in diseases of the genito-urinary system.

Q. How long have you practiced your specialty of Urology?

A. I have practiced this specialty for $2\frac{3}{4}$ years in Portland.

Q. What is your education and training with respect to medicine?

A. I finished medical school here in 1932 at the University of Oregon and spent a year then as an interne and a year as a resident in pathology and then was at the Mayo Clinic four [287] years and a half in urology.

Q. Doctor, this is a case of the Federal Trade Commission against Stanley Laboratories, Inc., a corporation, and Edward A. Bachman, an individ-

(Testimony of Dr. Thomas R. Montgomery.)
ual, Bachman trading as Stillman Products Co. and as Stanley Laboratories. The Commission has charged the respondent with making certain representations which it contends are deceptive and misleading. The representations with respect to the products which are sold by the respondent are set out in the complaint, in the indented paragraphs as shown in the mimeographed copy of the complaint which I hand you, beginning at page 2 with the item 1, as to Medicated Douche Powder. I ask you to read that, please, and familiarize yourself with it.

A. This represents——

Q. It represents the representations made by the respondent with respect to their product.

A. I see.

Q. I now hand you a typewritten sheet on which is set out the formula for that product, and ask you to examine that, that is for Medicated Douche Powder, M. D. Medicated Douche Powder, and bearing in mind the formula, I will ask you to examine the representations made with respect to its uses and efficacies, and state please in your opinion whether or not those representations are borne out by your experience and practice?

A. I would say “no”. [288]

Q. Now, will you take them specifically and state specifically with respect to each of the several representations whether or not they are truthful and borne out by your practice and experience. Take for instance, the first statement, “A valuable prescription for discriminating women.”

(Testimony of Dr. Thomas R. Montgomery.)

A. Well, I would take exception to that statement, of course. It may have some beneficial effect from its chemical cleansing action, but I think beyond that it probably is not——

Q. As a germicide in the destruction of venereal disease germs, or in the prevention of conception, would that be effective?

A. I think it wouldn't be dependably effective at all.

Q. Is there any douche powder or vaginal suppository or form of Contra-Jel or any of those things that is wholly effective?

A. No, there isn't; there is not.

Q. I direct your attention to Commission's Exhibit 51, upon which is depicted the picture of a nurse, the head of a nurse in a cross, with the letters M. D.,—M. before and D. after, and I ask you to state as a result of your practice and experience whether or not that is in any way deceptive and misleading?

A. I think it definitely would be considered misleading to the average person who sees anything like that. I think they would be led to suppose that that was endorsed by or produced by an M. D. and sponsored by the medical—members of the [289] Medical Society. I think that is deceiving.

Q. As a result of your contact with the public, and the treatment of patients coming to your office, do you know whether or not any of them prior to their consultation with you, had used douches or medicinal preparations for female trouble?

(Testimony of Dr. Thomas R. Montgomery.)

A. Yes, many of them had used douches.

Q. You learned that through them?

A. Through them, yes.

Q. Their statements to you? A. Yes.

Q. As the result of the use of douches, had their ailments been alleviated, or had they been aggravated?

A. No, I think they had not been alleviated. Whether or not it would relieve depended on the condition for which they happened to use the douche.

Q. Is the average woman or layman capable of diagnosing his own condition, determining what he is suffering from? A. No.

Q. Would a physician recommend any treatment until he had examined a patient?

A. They should not.

Q. Now, with respect to item No. 2, which is designated Contra-Jel, would you examine the statements, the representations made by the respondent with respect to that product and state whether or not they are in any way deceptive in your [290] opinion? The formula for the product is contained in the memo handed you?

A. Well, I think that it is deceptive to state that this is the highest quality of vaginal antiseptic.

Q. From examination of the formula, would you say that it was or was not the highest quality of vaginal antiseptic?

A. No, I would say that it is not antiseptic to any degree.

(Testimony of Dr. Thomas R. Montgomery.)

Q. Would that have the power to destroy syphilis? A. No.

Q. Or gonorrhea germs? A. No.

Q. Would it have the power to destroy spermatozoa and prevent conception?

A. Only very slightly.

Q. Would it be wholly effective?

A. Not, not wholly effective ever.

Q. Is there any Supercone or such product known to you in the medical profession that is dependable? A. No, I think there is none.

Q. And that is true, would you say, of Contrajels or jellies that are used by women as a means of protection?

A. Yes, as a contraceptive, yes, I think that is generally agreed to be true, that there is no dependable contraceptive jelly.

Q. Now, with respect to the item 4, "Femeze", we have here [291] Commission's Exhibits 47A and 47B, A being a carton in which the product is packed, and upon which is contained the following statement: "Contains acetphenetidin". Femeze appears to be from the tablet that was contained in the package, a tablet to be used according to the directions. Would you say that that tablet would afford relief from the pains accompanying menstruation?

A. Well, it is conceivable that it might possibly just as aspirin would.

Q. Would it cure or relieve the cause of it?

A. Not at all.

(Testimony of Dr. Thomas R. Montgomery.)

Q. It wouldn't affect the cause?

A. No, not at all.

Q. It is stated with respect to that, that it will bring about relief in a short time by relaxing the contracted womb muscles; would that be true or not?

A. It shouldn't be true. It should be untrue, as far as I know, this drug, if that is all that it contains, acetphenetidin has no effect on the muscles of the uterus at all.

Q. How does it affect one?

A. It acts through the central nervous system just as aspirin does, on the higher nerve centers. [292]

Cross Examination

By Mr. Levinson:

Q. Have you ever seen this product, Medicated Douche Powder, before today? A. No.

Q. You have never heard of it before?

A. Not to my knowledge.

Q. And Doctor, would you say that the letters M. D. as indicated on Commission's Exhibit 51 standing alone, give you the impression that it is a doctor's product?

Mr. Rhodes: I object to that question, if your Honor please, because the witness has not testified that these letters M. D. standing alone give any impression. He has testified with respect to the whole make-up of the advertisement as represented on the product.

(Testimony of Dr. Thomas R. Montgomery.)

Mr. Levinson: Well, I will reframe the question.

Q. (Mr. Levinson) Doctor, looking at this exhibit, Commission's Exhibit 51, would you state that the way this is made up, gives you the impression that it is compounded or prescribed by a doctor of medicine?

A. I believe I made that statement, yes, that the insignia suggests that is a medical product.

Q. I see. Does that mean because you see the letters "M. D." there, is that the reason?

A. I assume that is why those letters are there. [293]

Q. If you use the letters "M. D." without any name, does that indicate Medical Doctor, necessarily?

A. It often does to me, I think commonly does to me.

Q. If you saw "Baltimore, Md.", would that mean Baltimore, Doctor?

A. That isn't capital M.D.; it probably wouldn't.

Q. Supposing it was the same type of letters all the way through from Baltimore over to M.D., would you think that Baltimore was a Doctor?

A. Only if it were on a package of medicine.

Q. But then you would have to see the name first, plus the M.D., wouldn't you?

A. I think that would depend on the circumstances.

Q. That is true in all cases, the letters themselves depend primarily upon the circumstances, and the place, and everything that one would bring

(Testimony of Dr. Thomas R. Montgomery.)

to one's mind in trying to connect up some letters that he saw and what the letters meant, isn't that necessarily true? Do you get my question?

A. I think so.

Q. And now, Doctor, M. D. in this case could probably mean Medicated Douche, couldn't it?

A. Yes, that is conceivable, that's right.

Q. Now, the cross itself doesn't necessarily have application to doctors, does it?

A. Not the cross; it applies to Red Cross. [294]

Q. And J & J Bandages?

A. Yes, I believe they use that insignia.

Q. And adhesive tape? A. Yes.

Q. And cotton. Now, isn't it true, Doctor, that in the medical field which includes doctors and drugs and the like, there are certain symbols that have come to be used as indicating that they are drugs or doctors or things relating to that field that we are interested in, isn't that true, that there are certain things, for example, the cross with a nurse in it would indicate the product had something to do with medicine or doctors or drug or bandages,—anything relating to what a person may use on his body? A. Yes, that is true.

Q. Now, Doctor, do you have any objection to a woman using a douche powder?

A. I have no objection to a woman using a douche powder upon my suggestion.

Q. Upon your suggestion?

A. That's right.

(Testimony of Dr. Thomas R. Montgomery.)

Q. And is there any particular harm in a woman, upon your suggestion, using it and continuing to use a douche after she has left your care, you might say?

A. Yes, oftentimes it is objectionable to continue to use a douche. [295]

Q. It is. Now, you are familiar with the formula of this particular product? A. Yes, sir.

Q. Is there any particular objection to the use in a douche of boric acid? A. No.

Q. Is there any objection to the use of potassium alum? A. Not to my knowledge.

Q. Is there any objection to the use of phenol?

A. Sometimes, yes.

Q. And how about eucalyptol?

A. Your question is, is there any objection?

Q. Is there any objection to putting that in a douche? A. No.

Q. And oil of white thyme, is there any objection to that? A. No.

Q. Or oil of peppermint?

A. No objection.

Q. Or Oxyquinoline Sulphate? A. None.

Q. Or zinc sulphate?

A. No, not to my knowledge.

Q. Now, Doctor, if the use of a douche by a woman produced a psychologic effect on her, and was not harmful, would you have any objection to her use of it? For example, suppose I like to [296] gargle my throat in the morning. It doesn't do a

(Testimony of Dr. Thomas R. Montgomery.)

bit of good, it never gets at the cause, but I feel better, is there any objection to my gargling?

A. Only in so far as you might depend upon the gargle, or she might depend upon the douche without actually finding out whether there was anything wrong with her female tract or with your throat.

Q. Suppose it just had a psychologic effect on her, made her feel it was soothing and cooling.

A. I think that is a total loss as far as medical care is concerned.

Q. Assume it is not medical care, that she just psychologically likes a douche because it is soothing and cooling, is there any objection to that?

A. Not as long as it doesn't cover up something else. Although it is objectionable, as I said a while ago, to use douches repeatedly a long period of time, composed of drugs, I think it would be improper to use sodium bicarbonate in a douche or salt water indefinitely, that even that is objectionable, because it washes away the normal secretions.

Q. But there are medical authorities that have suggested to certain women who have certain gynecological conditions the use of a douche?

A. That is right.

Q. You yourself prescribe douches if the occasion calls for it?[297]

A. Yes, sir. [298]

J. C. ANDERSON

was thereupon sworn as a witness on behalf of the Commission, and being first duly sworn, testifies as follows:

Direct Examination

By Mr. Rhodes:

Q. Will you give your full name to the reporter, please? A. J. C. Anderson.

Q. How long have you lived in Seattle?

A. Well, this last time, about 4½ years.

Q. You have lived here prior to that time?

A. Yes, sir.

Q. What is your business?

A. I am Manager of McKesson-Robbins Wholesale Drug, Seattle Division. [301]

Q. In the course of the business of McKesson-Robbins, have you had occasion to handle products of the Stanley Laboratories? A. Yes, sir.

Q. Particularly the product such as Commission's Exhibit 51? A. Yes, sir.

Q. M. D. Medicated Douche Powder?

A. Yes, sir.

Q. Mr. Anderson, what in your opinion is the significance of the letters "M.D." the picture of a nurse's head within a cross as shown on that exhibit?

A. Well, I am of the opinion that it has—anything with a makeup like that, signifies purity or has sort of a professional atmosphere.

Q. By "professional" you mean the profession to which the doctors are attached?

A. Or a nurse, or something of that kind. [302]

HENRY M. WHITE

was thereupon called as a witness, and being first duly sworn, as examined and testified as follows:

Direct Examination

By Mr. Rhodes:

Q. Will you give your full name to the reporter? [303] A. Henry M. White.

Q. Where do you live? A. Seattle.

Q. How long have you lived in Seattle?

A. Since 1913.

Q. What is your business?

A. In charge of the Federal Trade Commission in this district.

Q. How long have you been in that position?

A. Since January, 1934.

Q. What was your business prior to that time?

A. Attorney.

Q. Did you practice in the State of Washington?

A. Yes.

Q. In the course of your duties in the investigation of the Stanley Laboratories, did you ever have occasion to interview Mr. Edward A. Bachman?

A. Yes, I interviewed him on three different occasions.

Mr. Levinson: May I ask the witness to fix the date? He said 1938.

By Mr. Rhodes:

Q. Yes, can you fix the date?

A. I can, from my report of my interview.

Q. Yes, refer to it.

A. The first as March 16, 1937; the second was

(Testimony of Henry M. White.)

April 26, [304] 1937, and the third was May 26, 1937, and then I called there later after that, but I saw someone else I think as I remember it.

Q. What was the purpose of your interviewing Mr. Bachman?

A. I was investigating a complaint against the Stanley Laboratories.

Q. Did you visit Mr. Bachman at the office of the Stanley Laboratories?

A. Well, at his drugstore.

Q. Where was that, in Portland?

A. In Portland, just across the street from the post office on Broadway.

Q. Will you state the substance of your interview with Mr. Bachman?

Mr. Levinson: Just a moment, please. If the Examiner pleases, the respondent will object to the form of the question because, as I understand it, he is calling this witness as an impeaching witness and in order to impeach the witness Bachman, you would have to direct his attention to the specific question he asked Mr. Bachman and to which Mr. Bachman replied, and then he can ask this witness as to what the testimony was, or what the evidence is, instead of asking him as he is doing now, what the nature of the conversation was.

Trial Examiner Reeves: I take it that the pending question is preliminary in its nature. The objection is overruled. [305]

The Witness: What was the question?

(Last question read aloud by the reporter.)

(Testimony of Henry M. White.)

A. Well, I would want to refresh my memory from my—I took notes of the interview and came home to the office and dictated the interview to my stenographer.

Q. From your notes? A. From my notes.

Q. From your notes made at the time?

A. From my notes made at the time after that, and it covers several pages.

Q. Was that report submitted to the Federal Trade Commission? A. Yes.

Q. And that report was dictated from your notes? A. Yes.

Q. Proceed.

A. This is March 16, 1937. Edward A. Bachman, firm name Stanley Laboratories,—do you want me to read the entire interview or the report of my interview?

Q. State what the substance of the report was that you submitted, what was the substance of the information gathered from Mr. Bachman in that interview?

A. Well, I asked him when I went in, to show me his laboratory, and he said, “Well, it is just where you are standing”, and I was then standing at the counter, near the northwest corner of the building. The corner of the building next to the [306] post office.

I then asked him how many employees he had in the laboratory, and he stated that there was none in the laboratory, that those who worked at the cigar counter and the food counter, and waited on

(Testimony of Henry M. White.)

the drug trade, were employees in the laboratory, and he stated that there was no separate department for a laboratory in the drug store, and he stated that there was no equipment such as a microscope or sterilizing equipment of any kind. Then he produced from under the counter a package of Contra-Jel and stated the product was put out by his firm, and it had with it a glass tube which could be screwed into the end of a tube containing the Contra-Jel and thus forced through the tube into the necessary parts of the woman. That was exhibited to me at that time, and he gave me a leaflet descriptive of this product, and that leaflet was headed, "For the Physician's Information", and then he gave me the other products that were put out by the Stanley Laboratories.

Q. What products were they?

A. Well, now, he handed to me a sample package of another product, called M. D. Medicated Douche Powder, and that was put into the record, then there was a leaflet descriptive of this product that was made a part of the record, then Mr. Bachman handed to your examiner two pamphlets entitled "A valuable prescription for discriminating women". That was [307] the heading of it, which was made a part of the report, and another pamphlet descriptive of another product sold by Stanley Laboratories marked Bachman Exhibit 7. This was a product known as Femeze tablets, and he stated that was manufactured by the Norwich Pharma-

(Testimony of Henry M. White.)

ceutical Company of New York City, but he didn't have a sample of that product.

Then the exhibit 8 was an advertisement—an advertising prospectus relating to M. D. Medicated Douche Powder, and other things, newspaper mats for advertising purposes. He stated that he was not an organized company, that he himself was the sole proprietor, and he stated that he had exclusive rights to sell the product—all the products being put out under the name of Stanley Laboratories, and no one else had any interest therein.

Then he stated that Stanley Laboratories had no separate room and had no other place in which it carries on the work of putting up those powders than in the drug store mentioned and prescribed herein.

Then I asked him why he used the words "Stanley Laboratories" and he stated he did so simply because he wanted the public to draw the conclusion that his products were manufactured in a laboratory and he thought it would be a better selling name than to use his own individual name. He stated that there was no doctor in his employ and no chemist in his employ. All the work was done by himself and his [308] employees in the drug store.

Then he stated that he has been selling the product since February 5, 1936 with exception of the Contra-Jel, which he was selling since 1933.

Then he stated that he did not sell a great amount at retail, but most of his sales were made through

(Testimony of Henry M. White.)

drugstores, his sales being confined to the states of Washington, Oregon, California and Idaho, and last year he stated that he sold—this was 1937, when he was testifying—he sold \$5,000 worth of the product. That he had stocked up quite a number of drugstores, and his sales this year had not been so much up to the time—had amounted to approximately \$300—but he was going to put on a campaign to help sell the products, and knew he could get a big seller from the success he had so far.

Then Mr. Bachman stated he simply assumed the name M.D., it was suggested to him by an advertising man, and the argument used was that it would lead the public to believe that it was medicated, and that the picture of the nurse on the label would indicate cleanliness, and he wanted to convey the impression, without baldly stating the fact, that the product had been endorsed by the Medical Association. He stated that he had the subject examined carefully by his attorney, who advised him that he had the right to the use of the words and designation “M.D.” He then stated he had made application [309] for the trade-name and hoped to be granted a copyrighted name.

Q. Now, on his subsequent interview, will you give us the substance of the interview had by you with him later, the next interview?

A. April 26, 1937.

Q. Was that interview also held in his place of business?

A. In his place of business. I then explained

(Testimony of Henry M. White.)

that I wanted to verify his former statement and to clarify some of it. I told him that I couldn't understand how the Stanley Laboratories without any equipment or room especially provided for that purpose could manufacture, pack, seal and label and distribute an article such as Contra-Jel. I called Mr. Bachman's attention to the fact that it would take pressure of some kind to fill a tube of Contra-Jel and some machinery would have to be provided for that purpose, and I wanted a more complete statement.

Mr. Bachman objected to any further interview, and stated that he was busy, and asked if I could return at some other hour. I told him that my time was limited, and that I would not be back in this part of the city, and that if it was not too inconvenient, I would like to have an interview at the time. He then submitted to the interview.

Mr. Bachman reversed his statement at the former interview, and admitted that he did not put up the products sold by him. The ingredients of Contra-Jel he stated are made by the [310] Holland-Ranton Company of New York City, that it was put up in New York and then shipped to his store in Portland unlabelled, and the informant places the label thereon and distributes to his customers.

I called Mr. Bachman's attention to the fact that this statement was exactly opposite to his previous statement, and he stated that he did not understand what I wanted the information for. I asked him how he put up M. D. Medicated Douche Pow-

(Testimony of Henry M. White.)

der, and he stated the ingredients contained in that powder were supplied by the Blumaeur-Frank Drug Company, a wholesale drug house. Informant buys them in wholesale quantities, and packs them in cans. The ingredients came to him already mixed, so all he had to do prior to selling, is to pack the product. I asked him how he handled the Femeze product, and he stated that he does not manufacture that in any sense of the word and does not put it out as his own product. It is sold to him by a New York Company and he simply represents the company as agent and it is consigned to him and sold by him to the public, acting as agent for the company in New York. He has nothing to do with measuring out the product or weighing it, and does not know the ingredients, and has no information as to the product whatsoever.

I then asked Mr. Bachman if there was any other product he put out and at first he refused to answer, then he admitted that he put out a product known as M. D. Supercones. This [311] product he stated was manufactured by the Norwich Pharmaceutical Company of New York City and he acted solely as distributor, and uses his own label of M. D. I asked him for a sample product, for the record, and he stated that he would sell me a box, but I told him that I did not feel inclined to buy it, and said that he should supply it. He gave me a box of M. D. Supercones, and same was made part of the record.

Mr. Bachman reiterated the statement that he had

(Testimony of Henry M. White.)

no measuring equipment, and not separate room for his laboratory.

He then stated that if the Federal Government was going to interfere with his business, he wished they would do so at once and let him alone, that he wanted to put on an advertising campaign, and did not feel justified in doing so if he was going to be interfered with.

Q. Did you have a further interview with Mr. Bachman?

A. Yes, on May 26, 1937, I asked Mr. Bachman to tell me where I could locate the Stillman Products Company, the company that advertised and sold Femeze mentioned and described in Bachman Exhibit 7, and he stated the company is out of business, that it was operated by a doctor not known to him, nor does he know the former address of the company.

He stated that Stillman Products turned over all of its products to him to sell on consignment. He did not pay for the goods, and has sold but little of it. He stated that if it proves to be a good seller, he has the formula and right [312] to manufacture and sell it, that he has made no accounting to the Stillman Products Company, but the stuff is lying in his drugstore.

He then stated that he did not manufacture or put up in the original package, any of the items mentioned and described therein, advertised as being manufactured by, sold by and distributed by Stanley Laboratories.

(Testimony of Henry M. White.)

He called me into the little booth used for the filling of prescriptions—that is, in connection with the drugstore. There was a girl therein wrapping packages of Contra-Jel in cellophane. He stated that the work consisted of all the work done by the Stanley Laboratories as far as it affected Contra-Jel, and the other products are wrapped by the manufacturers, and he stated that in his interview heretofore, he gave me the names and addresses of the companies who manufactured and put out the products.

Mr. Bachman then stated that he was not clear about the question of advertising and as to his legal rights and asked that I interview his advertising manager and his attorney.

Q. Did you examine the premises to see whether or not he had the equipment of a laboratory?

A. Yes.

Q. Did you find any such equipment?

A. I found nothing there except what you generally find in the back room of a drugstore. [313]

Q. You mean a retail drugstore?

A. Yes, retail drugstore.

Q. Did you ask to see the laboratory?

A. Yes.

Q. What was his reply?

A. His reply was, "Well, you see it right where you are standing now." That was on my first visit.

Q. Did you ask how many employees he had in his laboratory?

A. Yes, I asked particularly the employees in

(Testimony of Henry M. White.)

the laboratory and then he spoke about the fact that the girls who waited on the—he runs a restaurant in connection with his drugstore, and those girls and those who waited on the customers at the cigar counter, and other places, were employees.

Q. When you asked as to how many employees were employed in the laboratory, what was his reply?

Mr. Levinson: He answered that before.

Mr. Rhodes: I am asking him the specific question.

A. That those who work at the cigar counter and at the food counter and who wait on the drugstore are likewise the ones who work in the laboratory, and I saw, I think, three or four girls waiting on the customers, and I know there were one or two men there, and I saw one girl upstairs—that was later—and Mr. Bachman was there, too.

Q. Did he state in response to your inquiry that there were none, when you asked him the question as to how many [314] employees he had in his laboratory?

A. Yes. He didn't employ anyone in the laboratory and had no doctor in connection with it.

Q. In response to your question as to where the laboratory was located, did he state that there was no separate part of the drugstore used as a laboratory?

A. He stated that it was in his drugstore, and the writer then asked to see the room, and he stated, "It is just where you are standing"—"where you

(Testimony of Henry M. White.)

are" is the way he put it. In my report, I quoted that, those words, "Well, it is just where you are." That is a quotation.

Q. In your examination of the place to locate the equipment of the laboratory, did you find any microscope or sterilizing equipment?

A. No, there was none. That is, I saw none, and I asked to see.

Q. When you asked him with respect to the laboratory, did he state there was no separate room?

A. Yes.

Q. No other place wherein he carries on the business?

A. He said there was no other place except that particular address.

Q. Did you ask him whether there was a doctor or chemist employed in the laboratory?

A. Yes. [315]

Q. What was his answer?

A. His reply was that he had none.

Mr. Rhodes: That is all.

Cross Examination

By Mr. Levinson:

Q. What was the occasion of your interview of Mr. Bachman?

A. The complaint was filed against the Stanley Laboratories and was filed in Washington City and was sent here to my office.

Q. What was the nature of the complaint?

A. The nature of the complaint was as to advertising—false and misleading advertising.

(Testimony of Henry M. White.)

Q. And in what way was it false and misleading advertising?

A. In what way? Well, that is what I went there to examine him on, to see whether or not that was true.

Q. You went down there for that purpose?

A. Yes, the particular allegation being that "MD" was false, and misleading, and that that "laboratories",—

Q. It was in connection with these two words, the letters "MD" and in connection with the use of the word "Laboratories"?

A. That is the original complaint.

Q. And so pursuant to instructions, you went to Portland to interview him?

A. Well, not pursuant to instructions. I went there and took up the case in the regular order in which it had been [316] filed in our office, and I wasn't under instructions from anyone except my superior officer in Washington City to do my work, so I didn't go there specifically under instructions to examine this case, but to examine this case along with any other duties.

Q. So that is the reason that you came to Portland, is to interview Mr. Bachman and to see for yourself the circumstances under which this product was being sold? A. Yes.

Q. And of course, you made notes, didn't you, of what you saw? A. Yes.

Q. Do you have those original notes?

(Testimony of Henry M. White.)

A. Well, I—I dictated from those notes, this interview.

Q. And the testimony that you gave on direct examination is from the office copy that you have in front of you? A. Yes.

Q. You don't have your original notes, do you?

A. I have some of them, I think, but I don't make a practice of keeping those.

Q. May I see this report you have in front of you?

A. Yes. (Witness handing document referred to, to Mr. Levinson). I remember pretty near all of it.

Q. I just wanted to look it over.

Now, when you asked him where the laboratory was, he [317] stated in response to that inquiry that it was right where you were, did you get the impression he meant it was the cigar counter, or the drugstore?

A. Yes. I think Mr. Bachman was somewhat irritated at our investigation, and he simply made that assertion just as I put it in my report.

Q. But you didn't get the impression that was the laboratory, the cigar counter, did you?

A. Well, I got the impression the laboratory was the drugstore.

Q. Yes, in other words, his answer was just a facetious answer, wasn't it?

A. Well, I don't know whether it was that. I explained to you, I think, that he was somewhat irritated.

(Testimony of Henry M. White.)

Q. That is true.

A. And he simply made that sweeping statement, and I was standing right in front of the cigar counter, and he was standing in the rear of the cigar counter.

Q. But it was just a facetious remark, wasn't it?

A. Well, I wouldn't say it was. That is as near as I could answer it, just as I put it.

Q. You took it with a grain of salt, didn't you?

A. Well, I didn't after I looked through the building.

Q. It is quite a large store, isn't it?

A. Well no, it isn't a large store,—it is, oh I would [318] say it is 50 feet fronting on the street and it has the restaurant booths for the restaurant on the opposite side from that where we were standing, and then it has the stairway leading up into the little room upstairs back of the store room.

Q. Well, now, didn't he tell you that the product known as M. D. Medicated Douche Powder was compounded by the Blumauer-Frank Company?

A. Yes, that was the one product, and they put it all up and sent it to him in bulk, and then he measured it out.

Q. Didn't he also tell you that he didn't need a laboratory for that purpose?

A. Well, he just simply said, "Well, you see the laboratory".

Q. Did you go in the back of the store and look at the prescription room?

A. Well, I think that you would call it a pre-

(Testimony of Henry M. White.)

scription room. It is in the back of the store, and goes up the steps—stairs—I had to bend over to get up those stairs, and it was up on the higher elevation.

There is a window up there looking out over the store and that is where the young lady was working.

Q. You have not interviewed Mr. Bachman since May 26, 1937?

A. Yes. Let's see that date—I want to refresh my memory. May 26, 1937.

Q. That was the last interview?

A. That is the last interview with him. I have interviewed [319] others after that, his attorney Mr. Jacobson, on May 26, also, and then as I remember it, he incorporated the company and I interviewed the attorney after that, and I think that I saw Mr. Bachman then and he referred me to his attorney as to the incorporation.

Q. Now, he didn't state that he was manufacturing Contra-Jel, did he?

A. Well, now, I want to be—as I recall it, he said that was manufactured by a concern in New York.

Q. And you didn't go back to see if he had a laboratory, you didn't go in and examine the various equipment?

A. Yes, I went up in there. I looked around to see. I have been in laboratories. I took chemistry for one year, I know what a laboratory looks like, and it was nothing more nor less than simply the

(Testimony of Henry M. White.)

back room of a drugstore. I have been in drugstores on several occasions.

Q. Didn't he tell you, Mr. White, that the name Stanley was the name of his son?

A. He didn't say that. I think I got that impression, but as I remember it, his attorney gave me that impression. He may have—I may be mistaken about that—but I think his attorney gave me that impression. [320]

FRANK BLAKE

was thereupon called as a witness, and being first duly sworn, was examined and testified as follows:

By Mr. Levinson:

Q. Just tell us your full name?

A. Frank Blake.

Q. What is your occupation?

A. Registered Pharmacist.

Q. Who are you employed by?

A. Employed by the Bartell Drug Company. We have 22 stores.

Q. That is a chain store organization?

A. Yes.

Q. In Seattle, Washington?

A. Seattle only.

Q. How long have you been with them?

A. Five years. [321]

Q. Mr. Blake, I want to call your attention to Commission's Exhibit 51, which is a can reading

(Testimony of Frank Blake.)

“M. D. Medicated Douche Powder” and ask you if you ever saw a similar product?

A. Yes, sir.

Q. Is that product carried in your store?

A. Yes, sir.

Q. Do you personally sell that product?

A. Yes, sir.

Q. When a customer would come in the store, how would they ask for a product like that?

A. They frequently ask for it by name, by the trade-mark name, by “M.D.”.

Q. The “M.D.” would then indicate to the public that it is a trade-mark?

A. Yes, that is my impression.

Q. Did it ever indicate anything more to you?

A. Nothing more than it was an antiseptic douche powder.

Q. Are there many products on the market of the same or similar nature?

A. Yes, various manufacturers have other trade-names, — Bakarol, manufactured by Sharpe & Dohme as an antiseptic douche powder. Tyrees is another one that is on the market.

Q. Can you name any others?

A. Well, not offhand.

Q. How about Takara?

A. Yes, Takara is one. [322]

Q. When a woman customer comes into the store to ask for these products, do they ask for them by their trade-names? A. As a rule, yes, sir.

(Testimony of Frank Blake.)

Q. Is the M. D. Medicated Douche Powder a consistent seller? A. It is.

Q. Did anyone ever ask you whether or not it was compounded by a physician? A. No.

Q. Have you in the course of your duties in the drugstore seen the same women buying the particular product? What I am trying to get at is this: do these women customers frequently purchase the same brand? A. Yes.

Q. And is that particularly true of the M. D. Medicated Douche Powder?

A. I think that it is.

Q. Have you ever had any complaints from any customers about the use of any of these products?

A. No, sir.

Q. Now, would you say, Mr. Blake, that the picture of a nurse on the particular exhibit deceives a person?

Mr. Rhodes: I object to that, if your Honor please.

Trial Examiner Reeves: The witness may state what his own impression is.

Mr. Levinson: I will reframe the question. [323]

Q. (Mr. Levinson, continuing): Calling your attention to Exhibit 51, you will observe that it has a picture of a nurse in the cross? A. Yes, sir.

Q. And that is separated by the letters M and D? A. Yes, sir.

Q. Now, Mr. Blake, will you state whether or not that picture or that designation leads you to believe that it is a doctor's prescription?

(Testimony of Frank Blake.)

Mr. Rhodes: I object to that, if your Honor please.

Trial Examiner Reeves: The objection is overruled.

Mr. Rhodes: Note my exception.

Q. (Mr. Levinson, continuing): Answer the question, please.

A. My personal impression is that it does not bear that thought.

Q. I didn't quite get your answer.

A. My personal impression is that it does not have that effect upon the customer in their purchasing of that item.

Q. Is it not a fact, Mr. Blake that a similar designation or similar designations are frequently used on drug products?

Not frequently, but are they occasionally used on drug products to indicate cleanliness?

A. Yes. You will find those. You find baby pictures or something like that on J & J Powder.

Q. You have also seen it on toilet paper? [324]

A. Yes, the toilet paper bears the same initial as this, the toilet paper that is called M. D.

Q. The letters "M.D." in and of themselves, do not necessarily mean Medical Doctor?

A. Doesn't necessarily means a physician, no.

Mr. Levinson: You may inquire.

Cross Examination

By Mr. Rhodes:

Q. How long have you been a druggist?

A. 40 years.

(Testimony of Frank Blake.)

Q. So that you are familiar with medicinal products and the various brands that are used?

A. Yes, sir.

Q. You are familiar with the designation of doctors by the letters "M.D."?

A. Yes, sir.

Q. That is universally true, isn't it?

A. Yes, the initials are "M.D.".

Q. And you recognize personally a distinction between medicated products and groceries.

A. Yes, sir.

Q. And that a symbol applied to a medicinal product would not necessarily mean the same thing as if it were applied to a grocery product, would it?

A. Not necessarily. Of course, with a trade-mark, we look [325] at a number of those things as being specific trade-marks irrespective of what the letter may be, it would be a trade-mark name.

Q. Yes, as a druggist, you do look at the mark as a trade-mark, but in the opinion of the laity, the same mark used on a medicinal product would have a different significance from that symbol or mark used on a grocery product or dry goods product, would it not?

A. Well, it is pretty hard for me to say from a layman's mind what they might consider, in view of the fact that they come in and purchase these things under the trade-mark name irrespective of what the product is in a great many cases of a similar nature.

Q. Well, the cross on this package, being Com-

(Testimony of Frank Blake.)

mission's Exhibit 51, is a cross symbolic of Red Cross, is it not,—the Red Cross organization?

A. Well, they have a similar symbol, yes,—but it is——

Q. (Interposing): And a picture of a nurse is symbolic of the nursing profession, is it not?

A. Yes.

Q. And the letters M.D. are symbolic of the profession of doctor, is it not true? A. Yes. [326]

DR. FRANK J. CLANCY

was thereupon called as a witness on behalf of the Commission, and being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Rhodes:

Q. Will you state your full name for the reporter? A. Frank J. Clancy.

Q. Where do you live?

A. I live here in Seattle.

Q. What is your business?

A. I am a physician and surgeon.

Q. Will you state for the record your educational background?

A. Yes, I graduated from the University of Oregon School of Medicine in 1918, and I served as the Director of the Bureau of Investigation for the American Medical Association in Chicago in 1936 and 1937, and from there I put in two years in the

(Testimony of Dr. Frank J. Clancy.)

Graduate School of Medicine in the University of Pennsylvania in 1937 and 1939, from which institution I received a Master of Medical Science Degree.

Q. You are engaged in the practice of medicine here in [329] Seattle? A. Yes, sir.

Q. Doctor, this is a case of the Federal Trade Commission against the Stanley Laboratories, Inc. and Edward A. Bachman, an individual trading as Stillman Products Co. and as Stanley Laboratories. The Commission charges the respondent with certain representations which the Commission alleges are false and misleading. The representations are set out in the complaint in the indented paragraphs, pages 2 and 3, of which I hand you a copy. Will you examine that, please?

A. Yes, sir. The next page, too?

Q. The indented paragraphs, yes.

Have you read the matter set out there, Doctor?

A. Yes, sir.

Q. I now hand you the formula for the products, M.D. Medicated Douche Powder, Contra-Jel and M. D. Supercones, and ask you if you will examine that, please?

Trial Examiner Reeves: Is that an exhibit?

Mr. Rhodes: I don't know that that is the exhibit. That is a copy of the formula that was submitted by the respondent.

Trial Examiner Reeves: Well, it is only identified by your statement.

Mr. Rhodes: That is true. I want to hand it

(Testimony of Dr. Frank J. Clancy.)

to the attorney for the respondent to see if he agrees those are the [330] formulae?

Mr. Levinson: We have no objection to your showing that to the Doctor.

Trial Examiner Reeves: You may proceed.

A. Yes, sir.

Q. (Mr. Rhodes, continuing): Now, Doctor, taking up the products as they are listed, M.D. Medicated Douche Powder——

A. Yes, sir.

Q. Is that, according to that formula, a recent development of scientific research, by leading physicians and surgeons?

A. Well, I don't think these things have been developed by leading physicians and surgeons. They all run pretty much to a pattern. There are many of them on the market, and some of them put on one thing and leave out another, but I don't believe it is any great scientific research. These drugs are all well-known to medicine. They are all old timers. There is nothing remarkable about it.

Q. Is that product a cure for cuts, sores, burns and bacteria?

A. Of course I don't know what the strength of the phenol is in here. The only strength given is that of the Oxyquinoline Sulphate, 1/1000, which is antiseptic all right probably if it is in there in that strength, it would have some bacteriostatic action, that is true.

Q. It is recommended to be used one teaspoonful

(Testimony of Dr. Frank J. Clancy.)

to a quart [331] of water. In that solution, would it be a remedy, or cure?

A. I wouldn't think so in that strength, no.

Q. Is that product according to that formula, a germicide? In other words, would it combat the bacteria, say, of syphilis or gonorrhea?

A. Well, we would never depend on such a mixture in the treatment of either gonorrhea—and of course not in syphilis. In syphilis, of course, the medication is intravenously or intermuscularly and doesn't depend on local application.

Q. Is it a contraceptive?

A. Well, it might be that. I haven't had much experience with that. I don't know how much contraceptive value these things have. It might retard or immobilize the sperm to some extent. I don't think you could rely on it 100 per cent. but I suppose it is about the same as all the rest of those contraceptives.

Q. Are any of them reliable?

A. I don't think so.

Q. Is a person capable of self diagnosis?

A. No.

Q. With respect to diseases or conditions for which this is recommended as a cure or relief?

A. No, of course, that is a fallacy of patent medicine medication, is that they presume the patient is qualified to diagnose his own ailments and then prescribe the remedy, which [332] the patient is not capable of doing.

Q. Do I understand by your answer that he is

(Testimony of Dr. Frank J. Clancy.)

not capable of either diagnosing his own case or prescribing the remedy? A. Yes, sir.

Q. With respect to the product Contra-Jel as shown by that formula, would you say whether that is a contraceptive or will afford protection from venereal diseases?

A. I wouldn't think it would afford any protection particularly from venereal diseases. It is quite strongly acid, has a Ph of 2.7. That is on the acid side, all right. All of them have lactic acid and boric acid and oxyquinoline sulphate in them that I have seen the formulas of. As I say, it might inhibit the sperm. That is not a bacteria, that is something that is very perishable where bacteria of course will survive. I wouldn't think that this would have any value to kill bacteria.

Q. Would that product be a sure preventative of conception?

A. Well, I wouldn't want to qualify myself to say whether it would or wouldn't. I suppose it might in some instances, but I don't think you could say it would be effective 100 per cent., because I don't think any of these things are. I think how soon it was used after intercourse, how much of it was used, and the way it was applied, would make considerable difference in the value of the product.

Q. Would the individual be capable of applying it in a safe [333] and sure manner?

A. No, I don't think—the patient wouldn't know, I don't think, whether they had it in the

(Testimony of Dr. Frank J. Clancy.)

mouth of the cervix or not—I imagine that is where it is applied—I don't see how they could tell.

Q. What would you say with respect to the representations made about the product of M. D. Supercones?

A. I don't know what the Supercones are used for—"Stable and do not lose their antiseptic strength; powerful yet non-irritating antiseptic. Supercones remain in effective antiseptic contact many hours, actually soothing and beneficial as well as antiseptic." Well, I am not quite sure what the purpose it. Why should anyone be putting an antiseptic in them? Why should they be doing that? What is the purpose of it?

Q. Would they be effective in preventing or destroying the venereal disease germs — bacteria, rather?

A. I don't think we can rely on it as a prophylactic against venereal disease.

Q. Would it be a safe and sure contraceptive?

A. Well, as I said before, I don't think there is any such thing as a safe and sure contraceptive.

Q. Now, Doctor, with respect to the product Femeze, it is represented that the product contains the ingredients designated on the box, Commission's Exhibit No. 47A. Will you examine that, please? [334]

A. Well, it says it aids in relief of functional menstrual pains and cramps and it contains acetphenetidin, which is an acetanilid derivation, $1\frac{1}{2}$ grains per tablet. Well, this is typical of a group

(Testimony of Dr. Frank J. Clancy.)

of products of this class that are sold to women who know nothing about their reproductive organs, and this of course will only do what the pain killing part of it will do, and it is not curative in any sense. There are a great many on the market of just this type. This acetanilid has been condemned for being sold indiscriminately to the public many times by various branches of the Federal Government and by the American Medical Association and this is just one of those things that was sold.

Q. Would that be effective as a cure for a disease that caused pains at the period of menstruation?

A. Well, it wouldn't cure anything. It would only deaden pain. The cause would still be there when the effect of the medicine wore off.

Q. It is represented that the preparation will relax the womb muscles.

A. Well, I don't know what else is in there besides that acetanilid. Do you have the formula?

Q. No, there is no formula given.

A. Well, all that we have got there is the effect of the acetanilid which is a pain killing drug and an analgesic. That is true, I think it is one of the chief constituents of [335] bromo seltzer, which has been condemned by the Government for being sold indiscriminately and they felt that its use was harmful.

Q. With respect to the statement "it relaxes the womb muscles", what is the truthfulness of that, in your opinion?

A. I would say that it is false.

(Testimony of Dr. Frank J. Clancy.)

Cross Examination

Q. (Mr. Levinson): Do you limit your practice to any special branch?

A. Yes, to urology and urologic surgery.

Q. You are not a gynecologist, then, are you?

A. No, sir.

Q. Do you have any objection, Doctor, to the use of a douche by women?

A. None whatever.

Q. There is nothing harmful about it?

A. No, I don't think so, unless the ingredients in themselves are harmful.

Q. But just a product that has the ingredients such as M.D. Medicated Douche Powder, the formula of which you have noted, do you have any objection to a woman using such a powder?

A. No.

Q. And there would be nothing harmful about it?

A. No, not in itself. [336]

Q. In other words, if it had a psychologic effect upon the woman, there would be no objection to its use?

A. Well, that's all right, but I think you are lulling them into a false sense of security when it says it kills all bacteria, because that statement isn't true. Anybody would laugh you out of court on it. If you had a thousand medical men, they would all agree that this thing certainly does not kill all bacteria.

Q. Doctor, if the use of this Medicated Douche Powder or the effect of it is simply cooling and

(Testimony of Dr. Frank J. Clancy.)

soothing, and has a psychologic effect upon a woman, do you have any objection to its use?

A. No.

Q. Do you have any distinction between antiseptic and germicidal?

A. Well, they had to put it in the Wheeler-Lee Amendment to the Food and Drugs Act that an antiseptic must be germicidal. They put that in the last Food and Drugs Act. Before that time, the patent medicine people sold people a lot of stuff as antiseptics and germicides.

Q. Do you draw any difference between the two words?

A. I think that there is a distinction. I don't know as I am prepared to draw a fine distinction, one where it is bacteriostatic, where it would inhibit the growth of bacteria, and one where it would kill. [337]

Q. In other words, a product could be germicidal and not antiseptic?

A. It could be antiseptic and not germicidal, but if it was germicidal, it would have to be an antiseptic.

Q. If it was strong enough——

A. That's right.

Q. —it would go beyond the antiseptic stage?

A. It would become a corrosive, yes.

Q. So there is a difference between antiseptic and germicidal? A. That's right.

Q. Doctor, I want to call your attention to the Federal Trade Commission exhibit No. 51, the Medi-

(Testimony of Dr. Frank J. Clancy.)

cated Douche Powder can, are you able to see it?

A. Yes.

Q. Just looking at that can, Doctor, does that indicate any recommendation by the medical profession?

A. Well, I think it implies that, all right, subtly, to a great many people who do not read things carefully, or who do not recopy carefully. The words "M D" to people, I think, carry considerable weight. I think that it implies "Doctor of Medicine" or implies that doctors of medicine have put their stamp of approval on it, or have something to do with it, or it drags in the medical profession by implication, at least, I think.

Q. That is your opinion, isn't it? [338]

A. That would be my opinion, yes.

Q. Just seeing the letters "MD" alone, would that mean "doctor" to you, necessarily?

A. Yes, MD means Doctor of Medicine to me.

Q. Suppose you saw MD just on a window on the ground floor of a store, a machine shop, and just saw the letters "MD", would that indicate that there was a doctor in there?

A. Well, I would wonder what a machine shop would have "MD" on its window for, certainly, but by common usage, MD has come to mean the Degree of Doctor of Medicine, and you can't put MD after your name unless you have a right to put it there.

Q. That's it, exactly. It generally follows the name of somebody?

A. Yes.

(Testimony of Dr. Frank J. Clancy.)

Q. If you just saw the letters "MD" it wouldn't necessarily mean——

A. No, but when you build up by common experience that MD means Doctor of Medicine, and then take it out of where it is normally used and put it somewhere else, it still carries that implication. Of course, I think on patent medicine advertising and I have examined thousands and thousands of copies of patent medicine advertising, you have to be a pretty careful fellow to be sure it says what it really says, because it never says what it implies it says.

Q. Have you ever seen the letters MD used on any other [339] products?

A. I don't recall.

Q. Have you ever seen it used on a toilet paper?

A. Yes, I think there is an MD toilet paper.

Q. Just seeing the letters MD on toilet paper, does that give you the impression it is put out by doctors?

A. I think that is the impression they are trying to give, that it is backed up by the medical profession or that the medical profession has something to do with it or endorses it or approves it.

Q. The medical profession is opposed to the use by merchants or manufacturers of the letters MD on their products, is that true?

A. Well, I don't know. I have no authority to speak for the medical profession. I can only speak for myself.

(Testimony of Dr. Frank J. Clancy.)

Q. You have an opposition to the use of the letters MD on products?

A. Yes, I think so. The reason that I object to it, you are implying that doctors have something to do with it. You are dragging doctors in by the ears on a product that should get by on its own merit.

Q. You would be interested in seeing that the letters MD were not placed on products, is that true?

A. Well, I wouldn't go out and make any crusade about it, but I think that it is deceptive. [340]

Q. Do you recommend the use of douche powders to your patients?

A. Well, I don't have many patients where we use douche powders in urology, and occasionally we do recommend a vaginal douche but it is not as a rule powder. It is as a rule something that is used for a specific purpose.

Q. In other words, you formulate a prescription?

A. That's right.

Q. But to save the time of writing a prescription, suppose you just wanted to have your patient just take a douche for psychologic effect, would you say, "Go down and get a well known medicated douche powder"?

A. I don't think I would, no.

Redirect Examination

By Mr. Rhodes:

Q. The only time that you would recommend any douche is after an examination, is it not, of the patient?

A. That's right.

(Testimony of Dr. Frank J. Clancy.)

Q. And determination from the condition of the patient that it would give some relief?

A. Yes, for a specific condition after you have diagnosed it. [341]

DR. R. PHILLIP SMITH

was thereupon called as a witness, and being first duly sworn, testified as follows:

Direct Examination

By Mr. Rhodes:

Q. Will you give your full name to the reporter, please? A. R. Phillip Smith.

Q. What is your business?

A. Physician and surgeon.

Q. Will you state for the record your training and background?

A. Well, I graduated from college in 1930, from the University of Kansas Medical School in 1934, one year of internship from 1934 to 1935; four years of residency in obstetrics and gynecology in the University of Kansas Hospital.

Q. You are engaged in the practice of medicine in Seattle, are you? A. Yes, sir.

Q. How long have you been so engaged?

A. Two years,—almost two years.

Q. Do you specialize?

A. Yes. I do nothing but obstetrics and gynecology. [342]

Q. I hand you now what is admitted in the record to be the formula for three of the items, that is, M. D. Medicated Douche Powder, Contra-Jel

(Testimony of Dr. R. Phillip Smith.)

and M. D. Supercones, the indented matter on the page which I hand you. Have you read it?

A. Yes.

Q. With respect to the item designated Medicated Douche Powder, according to the formula which has been handed to you, will you state for the record your reaction to the representations made in the complaint under Item 1 on page 2?

A. The only thing that I can say right at first glance is the fact that oxyquinoline sulphate is merely bacteriostatic. It won't provide protection against all bacteria by any means. It is merely bacteriostatic. It isn't bacteriolytic. It will [343] stop the action, but it won't kill, and when you say "all bacteria", I don't know any product that will kill all bacteria. That is the thing that hit me as I saw it at first glance.

Q. It is stated that it is a recent scientific development, is that true, according to your opinion, or not?

A. There isn't a drug in there that hasn't been used for at least 25 years, I will say. They are all standard.

Q. It is also stated it is endorsed by physicians and surgeons. Is there any product on the market as a medicated douche, and particularly this product, that is endorsed by physicians and surgeons?

A. Absolutely not. We never endorse any one preparation because there is no one preparation will do the job for all women, and there are all kinds of conditions. [344]

(Testimony of Dr. R. Phillip Smith.)

Q. Is there any douche that would successfully——

A. There is no douche that will absolutely protect any patient as far as pregnancy is concerned that I know of.

Q. Now, Doctor, I hand you Commission's Exhibit 51 which is a container for the Medicated Douche Powder, and ask you to examine the representations made there, particularly with respect to the letters M D, the cross, and the picture of the nurse. What is your reaction as to the representations made there with respect to whether or not that product is approved by the Medical Fraternity?

A. Well, glancing at it immediately, you would think the [345] nurses approved it, and the Red Cross probably approved it, too, because they copied that type of cross.

Q. What do the letters M D signify?

A. Those to me mean Doctor of Medicine, but it certainly wouldn't be on any package—Medicated Douche is what it stands for, undoubtedly, but I think it is to make the public jump to the conclusion the doctors are sponsoring it, and no doctor would ever sponsor one douche powder for everything. There is no question about it.

May I say one thing more? I think one thing that stands out in my mind is the fact that these douche powders are put on the market for patients who go into the drugstore and ask for something to use for a douche and the druggist gives them

(Testimony of Dr. R. Phillip Smith.)

this, and they start using in it, and get into some very dire effects sometimes.

Part of my business is getting patients out of trouble that have gotten themselves in with patent medicines or drugs that they have used over a period of time, just as we have other preparations on the market today which will cause vaginitis, and cervical conditions from their constant use.

Q. What is the danger in self-medication by women?

A. They can get into extreme states from self-medication. For instance, the vaginal flora is governed by the Doderlein's bacilli. This bacillus is something that must be present for the woman to have a normal flow and anything too alkaline or [346] acid will sometimes affect that. Raising and lowering the Ph in the vagina allows other organisms which are not the usual type of flora to invade that patient's vagina, and cause all kinds of ulcerative conditions and erosions of the cervix, ulcerative vaginitis and erosion and everything to the point where they can get into some pretty serious conditions.

Q. That, in your opinion, is the objection to the use of Medicated Douche Powder? A. Yes.

Q. Any preparation of that kind? A. Yes.

Q. And self medication by women——

A. There should by no means be allowed to be self treatment.

Q. Is the average lay person, man or woman, capable of diagnosing his own case?

(Testimony of Dr. R. Phillip Smith.)

A. No, absolutely not.

Q. Or prescribing for it? A. No.

Q. Now, Doctor, with respect to the next product, Contra-Jel, it says, "Contra-Jel is the highest quality vaginal antiseptic in jelly form. Its consistency insures even distribution and prolonged contact with every part of the vaginal tract and its protective action endures as long as it remains within the vagina." Will you state with respect to the representations made of the treatment by this product? [347]

A. Well, in the first place, the claim here that its consistency insures even distribution and prolonged contact with every part of the vaginal tract is absolutely false. There is no preparation you could ever put in the vagina—if you could look inside of it,—that you could be sure every portion of the vagina, which is full of crypts and fissures,—so that you could have any jelly that would cover ever single area in the vagina.

In other words, I do not think it is possible. The average length of contraceptive ability of most jellies in the vagina is relatively short and [348] anything that is admitted into the vagina after a few hours is usually diluted with cervical secretions and so forth that come from the cervix until after a short time they are diluted to the point that they are no longer effective. Just because there is jelly in there is no sign it is a good contraceptive. The only thing I see in this what would possibly lead us to believe that it had any ability at all as a contra-

(Testimony of Dr. R. Phillip Smith.)

ceptive is the Ph 2.7 which if standard would help, but certainly it wouldn't do the whole job. It takes more than a Ph of 2.7 to stop sperm from getting into the cervical canal.

Q. Taking up M. D. Supercones, will you discuss those for the record, please, the representations made?

A. They are practically the same type of substance in that as they have in these other preparations, having added a little salicylic acid and mercury-iodide which I didn't see in the others, but they have there boracic acid, which they depend upon, and cocoa butter which is a good base, but what do they claim for them? I don't think they are antiseptic. Oxyquinoline sulphate is merely bacteriostatic and is not an antiseptic.

Q. Now, discussing the next product Femeze, it states: "It affords relief from functional pains and cramps which accompany menstruation".

A. What is the formula for it? [349]

Q. The ingredients in this exhibit stated in Commission's Exhibit 47A, which I hand you and ask you to examine——

A. The claims are absolutely false. If Acetphenetidin is the only ingredient in this thing, it has nothing to do with the relaxation whatever of the smooth muscle which the uterus is made up of. "Relaxing the contracted womb muscles, allowing them to react in a natural way—doesn't merely deaden with drugs or narcotics to stop pain". Acetphenetidin is an acetanilid derivative. It is very similar to as-

(Testimony of Dr. R. Phillip Smith.)

pirin. That is practically all that is, and aspirin will do just as good a job as this, in my opinion.

Q. Will this cause the contraction of the womb muscles?

A. Relaxing the contracted womb muscles—absolutely not. It won't do anything like that. The womb is made up of, the uterus and cervix is made up of smooth muscle, and it takes a smooth muscle relaxer and there is nothing like that in this. [350]

MRS. SLOAN CROFTON

was thereupon called as a witness on behalf of Respondents, and being first duly sworn, testified as follows:

Direct Examination

By Mr. Levinson:

Q. Tell us your full name, please?

A. Mrs. Sloan Crofton.

Q. Where do you live?

A. Seattle, 729 Broadway North.

Q. How long have you lived here?

A. Oh, possibly 14 years.

Q. Mr. Crofton is engaged in business here, is he?

A. Yes.

Q. Have you ever seen a product known as Medicated Douche Powder which is similar to Commission's Exhibit 51?

A. Well, I recognize that box, yes. [357]

Q. Where have you seen this before?

(Testimony of Mrs. Sloan Crofton.)

A. In drugstores, and in the homes of people I know.

Q. Have you had occasion yourself to use a product like this?

A. Yes, I always use a douche powder, and I use this one.

Q. How did you come to use this product?

A. Like I would buy anything else, just trying this one and that one.

Q. Have you been using it for some time?

A. Yes, I have used it probably over a period of a couple of years.

Q. Have you ever discussed the matter with your doctor? A. No.

Q. Have you found it to be a dependable product?

A. Why I have found it very nice for my use, which is just one of cleanliness.

Q. You notice it says MD. What does that mean to you?

A. I would say it is just a trade-name.

Q. Trade-name. Did it ever occur to you that it might mean "Doctor"?

A. No, I hadn't thought of it in that light.

Q. Did you ever think it might have some relationship with the medical profession?

A. I really didn't give it any thought.

Q. Have you ever seen a similar trade-mark on any other [358] product?

A. I think there is a napkin that had that same MD on it.

(Testimony of Mrs. Sloan Crofton.)

Q. Yes, how about sanitary napkins?

A. That is what I meant.

Q. Have you ever seen it on toilet tissue?

A. I don't recall.

Q. You say you have seen this in other women's homes?

A. Yes, I have seen it on the shelves of friends.

Q. Have they ever discussed the question of whether or not that was put out by doctors?

A. No.

Q. Do the letters MD lead you to believe it is a doctor's prescription?

A. Well, now that you ask me to go into it, I might be given the thought, but as I look at that package, that wouldn't occur to me. It would be the same as Listerine or anything else you see a label on.

Mr. Levinson: That is all.

Cross Examination

By Mr. Rhodes:

Q. How long have you been married?

A. About 20 years.

Q. How long did you say you had used this douche powder?

A. A couple of years.

Q. Do you have any children? [359]

A. I have.

Q. Have you had any children since you used this douche powder?

A. No.

Q. Was that the purpose of using it?

A. No.

Q. When you say you use it just for cleanliness do you mean by that the prevention of disease?

(Testimony of Mrs. Sloan Crofton.)

A. No, that is just a routine habit, the same as I wash my teeth.

Q. What douche did you use prior to two years ago?

A. Oh, I can't recall the name. I have used lots of different douche powders, but I have had this so long I can't seem to think back any further.

Q. How long have you used a douche powder?

A. Oh, possibly 14 or 15 years.

Q. And you have been married how long?

A. 20 years.

Mr. Levinson: I will call Mrs. Turnham.

MRS. ETHEL TURNHAM

was thereupon called as a witness, and being duly sworn, testified as follows: [360]

Direct Examination

By Mr. Levinson:

Q. What is your full name, please?

A. Mrs. Ethel Turnham.

Q. Where do you live?

A. 1459 Lakeside Avenue.

Q. How long have you lived there?

A. I have lived in Seattle about 10 years.

Q. Do you have any occupation? A. No.

Q. You are a housewife? A. Yes.

Q. Now, Mrs. Turnham, I am calling your attention to a can which is known as Federal Trade

(Testimony of Mrs. Ethel Turnham.)

Commission's Exhibit 51 and ask you if you have ever seen a similar can?

A. Well, yes, I have.

Q. Where have you seen it?

A. Well, I have used that, and I have noticed it in drugstores and homes.

Q. Calling your special attention to the letters "MD" on the can, what does that indicate to you?

A. Well, not necessarily anything, only just a name.

Q. Did it ever indicate to you that it might be a prescription of a doctor?

A. No, it hasn't. [361]

Q. Did it indicate to you it meant Medicated Douche?

A. Not necessarily. I never really thought of it.

Q. You didn't give it any thought? It was just the trade-mark as far as you were concerned?

A. Yes.

Q. Have you ever seen a similar trade-mark on other products?

A. Well, I have noticed M D toilet tissue.

Q. The letter M D on that can, do they lead you to believe it is a doctor's prescription?

A. Not necessarily.

Q. Have you ever discussed with anybody the use of that particular product?

A. Well, I know several girls who have used it and have talked about it.

(Testimony of Mrs. Ethel Turnham.)

Q. How long have you used this particular product?

A. Well, I imagine I have used it about the last three or four years. I couldn't say definitely.

Q. Have you found it efficacious for your purposes? A. Yes.

Mr. Levinson: That is all.

Cross Examination

By Mr. Rhodes:

Q. How long did you say you had been married? A. 10 years. [362]

Q. And you have used douche powder the past two years?

A. I have used this one I would say three or four years. I couldn't say definitely.

Q. How long have you used just douche powder?

A. I have always used douche powder since I have been married.

Q. You say always—you mean since you have been married?

A. That is what I say, ever since I have been married.

Q. What was your specific purpose in the use of the douche powder?

A. I think just merely cleanliness is all I have always thought of it.

Q. And you have never used it for any other purpose? A. No.

Q. You have never used it to prevent conception? A. No. [363]

Proceedings

Trial Examiner Reeves: We will proceed in the matter of Stanley Laboratories, Inc., et al., Docket No. 4130, pursuant to notice of hearing given on August 25, 1941.

As understood by the Examiner, the hearing has been arranged for the purpose of enabling Counsel for the Respondents to present a motion to strike out certain testimony.

Counsel for the Respondents may now proceed.

Mr. Hayden: Mr. Examiner—Off the record.

Trial Examiner Reeves: Off the record.

(Discussion off the record.)

Trial Examiner Reeves: On the record.

Mr. Hayden: Mr. Examiner, I appear here this morning on behalf of the Respondents in this case to present a motion to strike out certain testimony, and my reasons and authorities are as follows:

I have moved to strike out the testimony of the Respondent Edward A. Bachman, as shown in the record from page 159, line 2, to page 167, line 15, for the following reasons, that the interrogation of Mr. Bachman in that part of the record is merely cross-examination based upon a report of a Commission official, which report itself was never introduced in evidence, except through the testimony of the man who wrote it, and whose testimony was delivered at a later date.

Now, I have no objection whatever to the testimony [367] of Mr. White, who interviewed Mr. Bachman, but I think it highly improper to read

from a report of an investigator of the Commission and ask Mr. Bachman whether or not certain things specified in that report did or did not happen. The report, of course, as such was not admissible at the time, and I think it is just as improper to cross-examine the Respondent on such a report under those circumstances as it would be to put it into evidence piecemeal or as a unit.

Now, I moved to strike out also the testimony of the Witness F. R. Stipe, record page 202, line 10, to page 203, line 24, on the grounds that the witness was a salesman for a wholesale drug company, and there was no evidence that he knew the medical uses of MD Powder, or any other product in that category; and, secondly, for the reason that Commission's counsel interrogated Mr. Stipe on matter quoted from the complaint and asked the witness what purposes were to be served by the use of that powder.

Now, we contend that it is highly improper for counsel for the Commission to read the complaint to a witness, or any part of it, and then ask him questions based upon that complaint. We submit that the only proper thing for a witness to do is to answer questions based upon his knowledge of facts. This was not done. Counsel for the Respondents at that time objected to the questions asked from the complaint, and the objection at that time was overruled, and we think erroneously. [368] Now, we moved also to strike the testimony of Dr. Norman A. David, record page 207, line 1, to page 239, line 16, for the following reasons:

First, the testimony of the doctor concerned experiments with vioform-ciba, which is not a product having anything to do with MD Powder, and we submit there was no connection between the two, hence it was entirely inadmissible.

Trial Examiner Reeves: Off the record for a minute.

(Discussion off the record.)

Trial Examiner Reeves: On the record again.

Mr. Hayden: We submit in connection with the testimony on vioform-ciba that there was no testimony to show that the properties of that drug and MD Powder were the same, or that they reacted similarly to the tests made; consequently, the testimony can have no possible value as to the use or the characteristics of any ingredient in the MD Powder.

Secondly, the testimony concerning experiments on guinea pigs with oxyquinaline sulphate, which is an ingredient used in MD Powder, we think are worthless, first of all, because performed upon pigs and not upon women, and also because there was no testimony to show that the tests were used for the treatment of diseases or infections which are common to women, or to show that the conditions found in the guinea pigs were all similar to those found in women, so there is no relationship between the results of such tests and [369] in tests that might have been used on women with the same drug. And, furthermore, the drug is only one of the ingredients of MD Powder, and consequently no fair test was made, because the use of MD Powder

includes the use of a number of other ingredients as well.

We moved also to strike the testimony of Dr. David, record page 210, because the questions involved interrogations as to the complaint, and we submit that the complaint is not evidence; that the witness has no right merely to state an opinion on the complaint; that the complaint includes no proof; that an expert witness may express his opinion based upon facts only or upon hypothetical questions based upon evidence; that an expert witness has no right to testify merely as to his understanding of descriptive matter; and, finally, that the testimony of an expert witness based only on his understanding of the meaning of descriptive matter is worthless, because there is no evidence that his interpretation of that meaning is correct, that is, the generally accepted interpretation, nor that it is the interpretation of these respondents.

Further, the request of Commission Counsel for the Doctor's interpretation of the quotation found at page 210, lines 9 to 12, is objectionable, because that sentence is capable of a thousand interpretations. The witness did not write the advertisement. He was not in a position to interpret its meaning. [370] And we submit that the language of the advertisement speaks for itself.

The further quotation by Commission's Counsel of material from the complaint regarding oxyquinaline sulphate, record page 13, is objectionable also because the witness ignored the fact that

the drug is merely one ingredient of MD Powder, and witness failed to show that he understood the formula; and, further, because the Doctor inferred that the sulphate was used as a preventive against pregnancy, whereas neither the advertisement nor the doctor indicates any rational basis for such inference. The record shows affirmatively that there is no evidence whatever that MD Powder has ever been advertised to prevent pregnancy, nor that it has in fact been so used.

Now, Commission Counsel asked the witness, record page 220, lines 4 to 7, as to the impression made on his mind as to the truthfulness of certain statements. I think the impropriety of such a question requires no argument.

Commission Counsel, record page 221, lines 4 to 6, asked the witness for his impression of the meaning conveyed by the representations made. We think that no argument is needed there to prove the impropriety of such questions.

The Respondents further moved to strike out the testimony of Dr. Albert Holman, record pages 261 to 265, for the same reasons given in the case of Dr. David, because the witness testified as to his opinions of statements appearing in [371] the complaint, which is not evidence at all.

The Respondents moved also to strike out the testimony of Dr. Albert Holman, record page 285, lines 7 to 25, because he testified that in his opinion other people think that MD Powder is recommended by the medical profession. He says he was not personally misled. And we submit that expert

opinion cannot be used to show what is in other people's minds.

Respondents moved to strike out the testimony of Dr. Thomas R. Montgomery, record pages 287 and 288, which deals with the opinion of the witness as to allegations set out in the complaint, for the same reasons given for striking out the testimony of Dr. Norman A. David, and for the further reason that an expert witness is not entitled to express an opinion on charges, since such charges are not evidence.

Now, the Respondents moved further to strike out the testimony of Dr. Thomas R. Montgomery, record pages 288 and 289, dealing with the use of the letters "MD," because his opinion shows he thinks these letters deceive other people. There is no testimony to show that he was deceived, and we submit that he is not in a position to testify as an expert as to whether or not other people have been deceived.

We moved to strike out the testimony of Dr. Frank Clancy, record pages 331 and 332, for the same reasons just given in the case of Dr. Norman A. David, because Dr. Clancy likewise expressed opinions as to the charges in the complaint. [372]

We moved to strike out the testimony of Dr. Frank Clancy, page 388, with respect to the use of the letters "MD," for the first reason that the question was a leading question, and, further, because the answer merely indicates what the witness felt others might think, and there is no indication

that he was in position to know what other people thought.

We moved to strike out the testimony of Dr. Phillip Smith, record page 342 to 345, for the reasons that said testimony is mere opinion as to allegations in the complaint.

We moved to strike the testimony of Dr. R. Phillip Smith, record page 345, with respect to the use of the letters "MD," because the witness was asked as to his reaction as to whether the use of those letters was intended to indicate approval by the medical profession, and his answer did not express his own opinion, as to himself, but stated what he thought the opinion of others would be, and the doctor himself was not deceived.

Finally, we moved to strike the testimony of Dr. R. Phillip Smith, record page 345, concerning the purpose of putting douche powders on the market. No such question was asked by Commission Counsel, and there is no proof that MD Powder had any ill effect upon anybody; and on page 346 of the record the question asked about self-medication by women is objectionable because there is no proof that MD Powder is used by women who practice self-medication. There was no proof [373] that MD Powder ever caused ill effects to anybody; and, finally, the question of self-medication is immaterial here, because the Commission is not the guardian of the health of the whole people of the country, and it has no jurisdiction to consider the question whether people should diagnose their own ailments, either real or imaginary.

Now, if I may take a moment to present a few cases and authorities on these points.

I submit, first, that with respect to the objection to testimony of Mr. Bachman no argument is needed. The cross-examination of that witness was obviously inadmissible. The Commission later on examined Mr. White in person, and we think that is entirely proper. At that time Mr. Bachman had the right to introduce cross-examination if he felt that any testimony by Mr. White was erroneous.

Now, so far as the testimony of F. R. Stipe is concerned, a lay witness is obviously incompetent to testify as to the medical uses of a drug. A mere salesman has no standing in that connection.

So far as the testimony of Dr. David as to his experiments with viaform-ciba is concerned, it was obviously inadmissible, because it did not have any bearing upon the issues in this case, and was apparently merely intended as testimony which would be prejudicial to MD Powder on the basis of an analogy, not upon direct tests. And the testimony as to [374] guinea pigs was likewise worthless, because it had no relation whatever to MD Powder.

The testimony of the witness Dr. David dealing with his interpretation of quoted matter is erroneous and inadmissible, and as authority for the contention that an expert witness has no right merely to express his interpretation of quoted matter in such circumstances, I cite the case of *Connecticut Mutual against Lathrop*, 111 U.S. 612.

Upon the principle that an expert witness may express his opinion based upon facts, I cite the case of *Chicago, R. I. & P. Railway Company v. Holmes*, 94 *Northwestern*, 1007.

Upon the principle that expert witnesses are not permitted to testify as to interpretations or impressions, I cite the following cases: *Stephenson v. Atlantic Terra Cotta Company*, 230 *Federal* 14; *Lawrence v. Thompson*, 49 *New York Supplement* 839; *Henderson v. Brunson*, 149 *Alabama* 674; in re *Estate of Workman*, 174 *Iowa* 222; *Raub v. Carpenter*, 185 *U. S.* 159; *U. S. v. McGlue*, 26 *Federal cases* 1093.

Now, the testimony of Dr. Albert Holman with respect to matters contained in the complaint was likewise inadmissible, for the reasons just given; and the testimony of Dr. Holman concerning the opinion of other people is clearly inadmissible, since there is no proof that he knew what other people thought about this product. In connection with this matter, I cite 2 *Wigmore on Evidence*, paragraphs 661, et seq., and 7 *Wigmore on* [375] *Evidence*, paragraphs 962 et seq.

The testimony of Dr. Montgomery was likewise inadmissible, for the reasons just given; and the testimony of Dr. Frank Clancy was likewise inadmissible, for the reasons just given; likewise, the testimony of Dr. R. Phillip Smith.

Now, we submit that testimony by doctors who are qualified as experts to testify on matters of opinion is well recognized, but their testimony must

be factual or in answer to hypothetical questions based upon facts in the record.

Now, the precise question as to the application of rules of evidence to testimony taken in cases before the Federal Trade Commission we realize has never been adequately dealt with, either in the rules of the Commission itself or in the decisions of federal courts. The generally accepted theory is that the strict rules of evidence are somewhat relaxed in their application to testimony before the Commission. But we find nowhere, neither in Commission practice nor in federal decisions, any recognition of a principle which permits either experts or lay witnesses to ignore altogether the usual rules of evidence. The case of *Bene & Sons against Federal Trade Commission*, 299 Federal 468, indicates that the strict rules of evidence should not be applied rigorously to testimony before the Commission, but the following quotation from that case indicates that the court had no intention of opening the door wide: [376]

“We are of the opinion that the evidence or testimony, even though legally incompetent, if of the kind that usually affects fair-minded men in the conduct of their daily and more important affairs, should be received and considered; but it should be fairly done.”

Now, we submit it is perfectly clear that a fair-minded man could not possibly accept the testimony of a witness who was asked what he thought about the allegations in a complaint. This amounts to the same thing as asking a witness whether he

believes that the charges in an indictment are true. If a man who was accused of a crime and a witness took the stand and was asked his opinion as to whether or not the man was guilty as charged, we would be horrified. In a criminal case, and in other cases as well, the witness is permitted to testify only as to facts within his knowledge, and as to opinions which he is qualified to give if he is an expert.

Now, the act of Commission Counsel in this case in getting opinion evidence from doctors by reading the complaint is so thoroughly objectionable we think no real argument is necessary.

Now, equally objectionable, we think, was the practice of Commission Counsel in asking medical witnesses for their impressions of advertising material published by the Respondents, for their interpretations of advertising material heretofore published, and for their opinions as to whether or [377] not people (that is, people not including the witness) were led to believe that the letters "MD" indicated that the powder was sponsored by the medical profession. Now, we think no fair-minded man would accept as worth while the impressions, interpretations, and opinions of doctors or other expert witnesses on matters of that character.

For example, the advertising literature concerning MD Powder consisted in part of statements of fact and in part of statements of opinions which describe the product in complimentary terms. Certainly the opinion of a qualified witness as to the facts involved was worth while; certainly the opin-

ion of a doctor as to the opinions of the manufacturer could have no probative force in this case.

As a further example, the testimony of a doctor that the letters "MD" suggested "Doctor of Medicine" to him, but did not deceive him, is perfectly proper; his further testimony that in his opinion other people were deceived is worthless, since he could not know what was in the mind of other people unless he had information that they were in fact deceived.

No witness in this case has testified that in purchasing MD Powder he or she was deceived into believing that the letters "MD" indicated that the product was sponsored by a doctor or by the medical profession generally.

Now, perhaps the most authoritative and persuasive discussion of the matter of applying the rules of evidence in [378] cases of this kind is an article written by a member of the legal staff of this Commission, Wilbur N. Baughman, who has been with the Commission for many years.

I cite an article entitled "The Federal Trade Commission and the Rules of Evidence," by Wilbur N. Baughman, appearing in 5 Journal of the D. C. Bar Association, page 397, which was published in 1938, and in that article Mr. Baughman discusses in considerable detail the cases beginning with the Bene case and carrying it right down to date to indicate his view of the rules of evidence under which the Commission is guided.

Off the record.

Trial Examiner Reeves: Off the record.

(Discussion off the record.)

Mr. Hayden: On the record.

In this article Mr. Baughman cites all of the pertinent cases dealing with the matter of admission of testimony, and in order to save time I call attention in the record merely to the conclusion of the author with respect to the rules of evidence. He says in part:

“Thus, while it appears, from the few pertinent court cases on this question, that there has been some relaxation of the rules of evidence in admitting evidence before the Commission, particularly in the Bene case, yet it is evident that the Commission has adhered rather strictly to the common- [379] law rules of evidence, inasmuch as the liberalizing ‘prudent and fair’ test laid down in the Bene case has not been followed, and because there have been so few cases carried to the courts on this point.”

And, finally, Mr. Baughman says:

“Lastly, by way of summation and reiteration, it is submitted that it is clear that, while the Commission is not bound by the strict rules of evidence obtaining in the courts, and there has been some relaxation of these rules, as an examination of the cases digested discloses, yet none of these cases, not even the Bene case, goes so far as to sanction a finding based solely on hearsay evidence or incompetent evidence; that, furthermore, the Commission has been

conservative in its reception of evidence, as is disclosed by the fact that it has not followed the Bene case. This shows that the Commission does as a matter of fact adhere closely to the common law in the traditional manner."

Now, Mr. Examiner, I submit that, on the basis of this motion and the argument and authorities cited in this case, that those portions of the testimony which are affected by the motion to strike should be stricken, in accordance with the motion, on the grounds that the testimony complained of is inadmissible and incompetent, and should not form a part of the record in this case.

Trial Examiner Reeves: Have you any reply argument, [380] Mr. Bellinger?

Mr. Bellinger: Yes, Your Honor, just a few words. I do not think I will be more than ten minutes at the most.

Trial Examiner Reeves: All right.

Mr. Bellinger: Briefly, I shall take up the Respondents' motion witness by witness.

First, as to the testimony of the Respondent himself, Mr. Bachman, I would like to call Your Honor's attention to the fact that some of the very testimony that Respondent asks to be stricken from the record, testified to by Mr. Bachman, was cross-examination by his own counsel, brought out at the hearing by his own counsel under cross-examination, and Mr. Bachman was certainly not under cross-examination by the Commission's counsel; he was under direct examination. Now, I cannot see how

there can be any objection to examining Mr. Bachman with respect to an interview which he had previously with an official or representative of the Commission. He is an intelligent man. He knew what he was saying when he talked to this representative of the Commission, and when he was on the stand he certainly knew that he was not going to testify to anything detrimental to himself unless it was the truth. Now, he was subject to examination on what he had previously told a representative of the Commission. That was in an official investigation of his activities leading up to this case. And I submit in all fairness that anything that he might [381] have told this representative certainly laid him subject to being examined thereon when he took the stand. That seems too simple for argument to me.

Now, with respect to the motion of Mr. Stipe's testimony, I might call Your Honor's attention to the fact that the testimony shows that Stipe had been a salesman of this type of product involved in this case for many, many years.

I beg your pardon. Did you start to say something?

Trial Examiner Reeves: Off the record.

(Discussion off the record.)

Mr. Bellinger: So that it seems to me that a man who could qualify himself to the extent of having devoted almost his entire working life, you might say, to this line of activity had qualified himself as an expert to testify to practically anything with respect thereto; and if he could not know what

the uses of this product were, and what they were sold for, then he did not know his own name. He certainly was not capable of selling them if he did not know after all those years the answers to those very questions and was not capable of giving sound testimony thereon.

Now, with respect to the doctors, the chief objection seems to be that counsel for the Commission in his examination of these witnesses referred them to paragraph 3 of the complaint, which included the advertising representations of these products by the respondents and asked questions of them as [382] to those advertising representations contained in paragraph 3 of the complaint. Now, frankly, in all fairness, I am willing to admit that if those advertising representations were not in the record at that time that the questions would have perhaps been ill advised and improper. I do not think under ordinary circumstances it would be well to examine a witness with respect to allegations contained in the complaint. But my friend seems to overlook the fact in this case that those very allegations, verbatim, were admitted in the record in the very beginning of this case. At the very first hearing ever held in this case, right here in this room, on July 30, 1940, those allegations about which these witnesses were queried were admitted in the record in a stipulation by the Respondent, shown from pages 3 to 9, I think, in the record. So it seems to me mere child's play to say that this testimony should be ruled out because the complaint that the witnesses were asked about was not a part of the

evidence. I admit the complaint is not evidence, but it so happens that the exact language contained in the complaint that they are kicking about was in the record in two places; first, in that stipulation, and, second, in the advertising exhibits which were introduced by the Commission containing the exact language about which they were questioned. So I do not think any further comment with respect to these objections as to the doctors' testimony is necessary. [383]

Now, the objection that experts could not be asked to say what the impression on other people's minds would be from reading certain advertising might also be taken under certain circumstances, but they were not asked exactly in that way. They were asked what the reaction would be, or what the impression would be after reading this testimony, and these men being experts, having had a long line of professional experience with women, dealing in such problems and such troubles and such products as are involved in this case, it seems to me could certainly give their viewpoint as to what their experience had been from those women, what they had gotten from those women in the way these women thought, and the uses for such products, and what they could get in seeing them advertised. There was a vast difference in eliciting or obtaining that type of testimony from experts, who had dealt in this line of business, and these troubles, and these products all their lives, and getting the same sort of testimony from a layman, such as I am, who would not be

calculated to know possibly what a woman might think by reading these things.

Now, the only other objection is as to the testimony of Dr. David with respect to his tests with the drug vioform-ciba, which is the same thing as iodochlor sulphate. Now, counsel argues that that testimony should be stricken because it is worthless, because it does not amount to anything. Well, as a matter of fact, that doctor testified that that [384] drug was related closely, was his exact language, as disclosed by the record, was not similar to, but was related closely to the oxyquinoline sulphate, which is an ingredient and an important ingredient in the MD Powder, with which we are concerned in this case. So that the gist of his testimony along that line would be to the effect that this drug that was contained in here was so similar to the drug he dealt with that it perhaps would have the same reaction on people and animals. Now, as to whether that is worthless or not we are not concerned with. Counsel might argue that considerable of this testimony is worthless. In fact, it seems to me that all argument in any case with respect to testimony, if you are opposing it, is that it is worthless. That is the old cry. That is the only thing that I can say. But when you say the testimony is worthless you are not damning it as being inadmissible. Maybe it is worthless. I do not know what the Commission will say about it. I do not know how valuable the Commission will consider it. I am frank to say that I do not think it is of such grave importance that any single point in the case is going to

turn on it. But I think it is admissible, worthless or not worthless, for the Commission's benefit in considering it. I do not think the fact that he may argue that it is worthless means that it was incompetent or inadmissible. I think that goes to the weight of the thing, the weight that should be given to it, and it is perfectly admissible for what [385] it is worth.

Now, that I think, is clearly the viewpoint that any court should take on that type of testimony with respect to that type of objection. And I think that covers briefly and generally every objection that is made to the testimony of these witnesses. In other words, I think the greater volume of the testimony objected to is objected to by reason of the method of examination that was used by Commission's counsel in the West in referring to these allegations, or this allegation in the complaint with respect to the representations, the advertising representations. And since, although I admit that the complaint was not evidence, since that thing was verbatim in evidence, in the exhibits, and in the record in the stipulation, I cannot see how there can possibly be any objection to it. I think it was perfectly admissible.

And here is another point. If it were ruled out on that technical objection alone, the case is not closed, and it would simply mean, if Commission's counsel thought the testimony was important enough, that we will have to have further hearings and produce the same proof without the use of the complaint.

That is all I have to say.

Mr. Hayden: In reply, Mr. Examiner, I want to make the following comment.

First as to the testimony of the defendant Bachman. [386] My friend says that it was not cross-examination but direct. The form of the examination can lead to only one conclusion: It was conducted as cross-examination and not as direct examination. If it were direct examination then the Commission would be bound by it.

Now, the form of the examination consisted in reading from Mr. White's report and asking Mr. Bachman if this was not true and if that was not true. Now, I submit that was highly improper. It was inadmissible testimony in that form. The Commission did get Mr. White's report in evidence, quite properly, from Mr. White himself. I did not object to that. I do object to doing on cross-examination what is obviously improper, when the same testimony was afterwards introduced in the proper way.

Now, so far as Mr. Stipe is concerned, he was a salesman. He was asked as to the medical uses of drugs. I do not care whether Mr. Stipe sold drugs for one year or for a hundred years; that still did not qualify him as an expert on the uses of drugs. A gasoline station attendant may sell me gasoline all his life, but he still does not know the chemical properties of any of his products, nor is he qualified to state anything with regard to them, except the bare fact that he is selling what is obviously before him. There is no testimony to show that Mr.

Stipe in all of his years as a salesman had ever become an expert or was qualified in any [387] way to testify as to the medical uses of the drugs he sold.

Now, with respect to the doctors, I think it is clear that it is never proper to ask a witness his reactions or his impressions, or his views as to charges in a complaint. Now, we have these objections not only to the form of the questions. It is fundamental that a witness cannot testify as to his views of charges made in a complaint, nor as to his opinions of the truth or falsity of those charges.

Obviously the purpose of the witness in answering those questions was to testify on behalf of the Commission as to his views as to whether or not MD Powder and the other products concerning which the complaint was made were good or bad, were truthful or untruthful, and the testimony of those witnesses was obviously prejudicial and so intended. Under those circumstances I submit that it was highly improper to ask any expert witness to condemn or praise, as the case may be, any statement concerning any product quoted merely from a complaint.

Now, it is quite true that the stipulations and the exhibits in the case were present. It would have been a simple thing for Commission's counsel to hand a box of MD Powder to a witness and ask him what he knew about it, ask for facts, and if he knew the facts, to ask for an opinion based on those facts. But none of those witnesses had any real familiarity with MD Powder. They were simply asked as to [388] whether or not they thought that

the statements in the charges were true or untrue, or what not.

Now, counsel seems to agree that these doctors were not in a position to testify generally as to the opinions of other people, but he feels that these doctors had had so much experience with women and with these drugs that they were competent to testify out of their experience. The record, however, does not disclose that any doctor who testified testified that as a result of his experience with women that any woman had been deceived by the purchase of MD powder thinking that it was approved by any doctor or by the medical profession. As a matter of fact, most of the doctors who testified had never seen or heard of MD powder before and had never used it in their practice.

Now, with respect to the tests made on vioform-ciba, my argument was not merely that it was worthless. Yes, we think it is worthless; but the fundamental objection I stated was, and I repeat it, that the introduction of that testimony was improper; that it was not only prejudicial, but that it was inadmissible in the circumstances. The mere fact that the drug might be related closely to the oxyquinoline sulphate is no excuse for testifying as to experiments made with vioform-ciba. We must not forget that the oxyquinoline sulphate was only one of a large number of ingredients in MD Powder. The MD Powder was never separated into its component parts for use; [389] it was used as such. And the effect of the oxyquinoline sulphate was a part only of a general formula. I

think for a doctor to testify that he had made tests with another drug closely related to the oxyquino-line sulphate, and to say that on the basis of that he disapproved of the whole formula, is absurd. There was not any proof whatever that any test was made of MD Powder by any doctor who testified for the Commission. Now, if experiments are to be introduced in evidence to show that MD Powder is good, bad, or indifferent, such tests should be made on the product concerning which the Commission is giving its consideration, and not upon some other drug, by itself.

Now, we submit further that the objection to these portions of evidence is not merely because of the method of the examination. I think counsel for the Commission agrees the method was bad. We object not only because the method was bad, but for the more fundamental reason that the answers, themselves, for the most part were thoroughly inadmissible, because they stated in part offhand opinions based, not upon their experience, not upon their experiments, but simply upon their supposed medical knowledge.

Now, counsel says that we have interposed merely a technical objection. We submit that the admissibility or inadmissability of evidence is a technical matter. Now, the Commission has been in business for a long time and its counsel [390] are presumed to know that if a piece of testimony is inadmissible in the form in which it is offered it is inadmissible regardless of form.

Now, if it results that further hearings must be

had in order to introduce testimony the Commission may think it necessary, that is immaterial here. That is no excuse for keeping in the record and making a part of this case testimony which is inadmissible and incompetent and improper under the rules.

That is all I have to say, Mr. Examiner.

Trial Examiner Reeves: Off the record for a moment.

(Discussion off the record.)

Trial Examiner Reeves: It is the opinion of the Examiner that the motion to strike out certain testimony filed by counsel for the Respondents on July 25, 1941, should be denied, and it is so ordered, to which ruling counsel for the Respondents are given exceptions.

Mr. Hayden: We note our exceptions.

Trial Examiner Reeves: We will now adjourn without date. [391]

[Title of Commission and Cause.]

CERTIFICATE OF COMMISSION TO TRANSCRIPT OF PROCEEDINGS

I, Otis B. Johnson, Secretary of the Federal Trade Commission and official custodian of its records, do hereby certify that transmitted herewith is a full, true, and complete transcript of proceedings had before the Federal Trade Commission in the above entitled matter, except original exhibits to testimony which, in accordance with agreement between counsel, will be certified later.

That photostat copies of Commission Exhibits 7, 8 a-b, 9, 10, 13, 14, 15, 16, 17 a-c, 18, 19, 20, 21, 22, 23, 24, 25 a-b, 26 a-b, 27 a-b, 28, 29 a-b, 30 a-b, 31 a-b, 37 a-b, 38 a-b, 39 a-b, 41, 48, 49, 50, and Respondent Exhibits 1 and 2 are transmitted herewith.

That this transcript is certified to the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to the filing in said Court of a petition for review of an Order to Cease and Desist, dated April 1, 1942, entered by the Federal Trade Commission in that proceeding.

In witness whereof, I hereunto subscribe my name, and affix the seal of the said Federal Trade Commission at its office in the City of Washington, D. C., this 24th day of February, A. D. 1943.

[Seal]

OTIS B. JOHNSON

Secretary

[Endorsed]: No. 10149. United States Circuit Court of Appeals for the Ninth Circuit. Stanley Laboratories, Inc., and Edward A. Bachman, an individual trading as Stanley Laboratories and as Stillman Products Company, Petitioners, vs. Federal Trade Commission, Respondent. Transcript of the Record. Upon Petition to Review an Order of the Federal Trade Commission.

Filed March 2, 1943.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10149

STANLEY LABORATORIES, INC., and ED-
WARD A. BACHMAN, an individual trading
as STANLEY LABORATORIES and as
STILLMAN PRODUCTS COMPANY,
Petitioners,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

PETITION TO REVIEW ORDER OF FED-
ERAL TRADE COMMISSION TO CEASE
AND DESIST.

To the Honorable Judges of the United States
Circuit Court of Appeals for the Ninth Cir-
cuit:

Your petitioners, Stanley Laboratories, Inc., a
corporation, and Edward A. Bachman, an indi-
vidual trading as Stanley Laboratories and as Still-
man Products Company, respectfully represent:

I.

That the Stanley Laboratories, Inc., is a corpo-
ration doing business in the State of Oregon, and
Edward A. Bachman is an individual residing in
the State of Oregon and is President of Stanley
Laboratories, Inc., and that they are both con-

ducting and carrying on their business in an area within the territory of the United States Circuit Court of Appeals for the Ninth Circuit and the acts and statements referred to herein were done and made within said circuit.

II.

That on or about the 7th day of May, 1940, the respondent Federal Trade Commission, pursuant to an act of Congress approved September 26, 1914, entitled "An Act to Create the Federal Trade Commission, to Define its Powers and Duties and for other Purposes," as amended, (15 U.S.C.A. sec. 45), issued, filed and served its complaint against your petitioners charging your petitioners with unfair and deceptive acts and practices in commerce within the meaning of the Federal Trade Commission Act aforesaid in the sale of medicinal preparations known as MD Medicated Douche Powder, Contra-Jel, Femeze, and MD Supercones, in violation of the provisions of said act as amended. A copy of said complaint will appear in the transcript of the record in said proceedings to be filed herein by said respondent.

III.

That on or about the 31st day of January, 1940, your petitioners herein filed a stipulation with the Federal Trade Commission, hereinafter referred to as the Commission, stipulating that they had ceased and desisted from and would at all times thereafter cease and desist from the matters complained

of, except the use of the letters "MD," which was not acceptable to said Commission; that thereafter your petitioners herein filed an answer to said complaint; that thereafter your petitioners and said Commission agreed upon a stipulation concerning certain phases of the case, which was duly filed in the record of the proceedings in the case; that thereafter a second stipulation was filed in the record of this case by agreement between your petitioner and said Commission. All of the above papers and documents will appear in the transcript of the record of the proceedings to be filed by the respondent in this case.

IV.

After the joinder of issue in said proceedings between your petitioner and respondent herein, said respondent set the matter down for hearing before Trial Examiner William C. Reeves of said Commission and thereafter testimony was taken on behalf of your petitioner and on behalf of respondent in Washington, D. C.; Detroit, Michigan; Portland, Oregon; and Seattle, Washington, as will appear from the printed transcript of the entire record in said proceedings to be filed herein by respondent.

V.

That thereafter a report upon said hearings was filed by Trial Examiner Charles A. Vilas on the 3d day of November, 1941, original Trial Examiner Reeves having died in the meantime; thereafter the Commission through counsel filed a brief

in the case and an answering brief was filed by your petitioner; that oral argument was heard before the Commission, and thereafter the Commission on the first day of April, 1942, made certain findings of fact and conclusions of law (served on your petitioner on April 3, 1942, a copy of which is attached hereto marked "Petitioners' Exhibit A" and at the same time the Commission issued an order to cease and desist against your petitioners with respect to the product MD Medicated Douche Powder, a copy of which order to cease and desist is attached hereto and marked "Petitioners' Exhibit B"; both of these exhibits are incorporated herein by reference.

VI.

That your petitioners, believing themselves aggrieved by the said "Order to Cease and Desist," and considering the same unlawful, prejudicial to their interests and being without a remedy except in this court, which is specifically designated by the said Act as amended as the court to review the orders of the said Commission, hereby petition this court for a review in this court of said order to cease and desist filed by said Commission and petitioners assign various errors of the Commission in the proceedings held before it. The principal errors of said Commission are as follows:

1. That the findings of the Commission as to the facts, and the conclusions of the Commission as to the law involved, and the order of the Com-

mission based thereon are invalid for the reason that the Commission was without legal power to make said findings or said order and for the further reason that said findings and the said order are not supported by the testimony on the evidence in the case.

2. That said findings of fact, conclusions of law and the order to cease and desist are not supported by credible evidence in the case and the record of the proceedings in this case does not contain evidence which any reasonable person would accept as adequate to support said findings of fact, conclusions of law or order to cease and desist.

3. That the said findings of fact, conclusions of law and order to cease and desist are based in part upon testimony which was inadmissible in evidence, and were in part based upon testimony secured by the Commission by unfair and improper means and which was irrelevant, immaterial and inadmissible in evidence.

4. That the said findings of fact do not show that your petitioners are guilty of unfair competition with any person selling similar products and do not disclose that your petitioners are engaged in any business which constitutes unfair or deceptive acts or practices in commerce within the intent and meaning of the said Act as amended.

5. That most of the medical testimony in the case on behalf of respondent was irrelevant, immaterial and inadmissible in evidence; that said testimony was based largely upon a consideration of the complaint by said witnesses and their testi-

mony was merely opinion as to the truth or falsity of matters set forth in said complaint. That paragraph 7 of said findings of fact and paragraph 4 of said order to cease and desist are based upon testimony incredible in its nature, improperly secured by the Commission and unworthy of belief by any disinterested person, and further that said paragraphs do not show that any person was deceived by either of the products of your petitioners or that any member of the public who might purchase either of said products was deceived in any way by the use of the letters "MD" on MD Medicated Douche Powder; that the testimony on the contrary showed that many persons had purchased said MD Medicated Douche Powder and were entirely satisfied with it.

6. That said conclusions of law and order to cease and desist are erroneous, contrary to law and in excess of the power and authority of the Commission.

7. That the conclusions of law and the order to cease and desist are not supported by the said findings of fact.

Wherefore, your petitioners pray that a copy of this petition be served upon the respondent and that the respondent be required to certify and file in this court the transcript of the entire record of the proceedings of the respondent against petitioners and that the findings of fact, conclusions of law, and order to cease and desist attached hereto as petitioners' Exhibits A and B be set aside and

held for naught, or that the order to cease and desist be modified, altered or changed, or that this Honorable Court reopen said proceedings for the purpose of taking such additional testimony as to the court may seem necessary and for such other and further relief as to this court may seem proper and just in the premises, and that the petitioners may recover their costs herein expended.

STANLEY LABORATORIES,
INC., a corporation, and
EDWARD A. BACHMAN, an individual trading as STANLEY LABORATORIES and STILLMAN PRODUCTS COMPANY.

By EDWARD A. BACHMAN

LEO LEVENSON, Esquire

Spalding Building
Portland, Oregon

JAMES J. HAYDEN, Esquire

1323-18th Street, N.W.

Washington, D. C.

Attorneys for petitioners.

State of Oregon

County of Multnomah—ss.

Edward A. Bachman, being by me first duly sworn, deposes and says:

That he is the President of Stanley Laboratories, Inc., a corporation, and respondent before the Fed-

eral Trade Commission in the foregoing matter; that he has read the foregoing petition and knows the contents thereof and the same are true to the best of his knowledge and belief, and that he subscribes said petition in his capacity as President of Stanley Laboratories, Inc., being thereunto duly authorized, and as an individual.

EDWARD A. BACHMAN

Subscribed and sworn before me this 27th day of May, 1942.

[Seal] LEO LEVENSON,

Notary Public in and for said County and State.

My commission expires 4-14-46.

PETITIONER'S EXHIBIT A

[Here follows Findings of Facts and Conclusion, set out as Petitioner's Exhibit A, which is previously printed on pages 21-29 of this record.]

PETITIONER'S EXHIBIT B

[Here follows Order to Cease and Desist which is set out as Petitioner's Exhibit B, which is previously printed on pages 30-33 of this record.]

[Endorsed]: Filed May 23, 1942. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

STATEMENT OF POINTS UPON WHICH
PETITIONERS RELY

Come now your petitioners in the above entitled cause and respectfully submit to this court a statement of points upon which petitioners intend to rely, as follows:

1. That the findings of fact and conclusions of law are not based upon substantial evidence.

2. That the order to cease and desist issued by the Federal Trade Commission is not supported by substantial evidence.

3. That the findings of fact, conclusions of law, and order to cease and desist are based upon a distorted construction of the testimony, and not upon a reasonable view of all the evidence in the case.

4. That the findings of fact, conclusions of law, and the order to cease and desist issued by the Federal Trade Commission, insofar as the same pertain to the product MD Medicated Douche Powder, are based upon testimony of Commission witnesses, which testimony was secured by unfair and improper methods and was inadmissible in evidence.

5. That the findings of fact, conclusions of law, and order to cease and desist issued by the Commission, insofar as the same pertain to the product MD Medicated Douche Powder, was based wholly upon testimony of Commission witnesses secured by unfair and improper methods as aforesaid, and

completely ignore undisputed testimony of numerous witnesses for respondents.

6. That the stipulation filed by respondents on January 31, 1940, makes a cease and desist order improper and unnecessary in this cause.

7. That the motion of respondents to strike certain testimony should be granted in full.

8. That the order to cease and desist is not supported by the findings of fact or the conclusions of the Commission.

Respectfully submitted,

LEO LEVENSON, Esquire

Spalding Building

Portland, Oregon

JAMES J. HAYDEN, Esquire

1323-18th Street, N.W.

Washington, D. C.

Attorneys for petitioners.

[Endorsed]: Filed June 17, 1943. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF PARTS OF THE TRAN-
SCRIPT OF THE RECORD TO BE
PRINTED

1. Complaint.
2. Answer.
3. Stipulations.
4. Testimony as follows:

Page 2, line 1 to page 9, line 9.

Page 11, line 15 to page 11, line 18.
Page 15, line 15 to page 16, line 12.
Page 24, line 2 to page 29, line 14.
Page 30, line 18 to page 30, line 25.
Page 31, line 4 to page 38, line 20.
Page 39, line 13 to page 50, line 1.
Page 51, line 15 to page 63, line 7.
Page 65, line 1 to page 72, line 16.
Page 79, line 12 to page 90, line 20.
Page 100, line 3 to page 119, line 11.
Page 123, line 17 to page 164, line 7.
Page 165, line 5 to page 190, line 1.
Page 206A, line 10 to page 219, line 12.
Page 227, line 7 to page 234, line 15.
Page 240, line 19 to page 243, line 3.
Page 243, line 18 to page 245, line 11.
Page 246, line 11 to page 249, line 13.
Page 249, line 23 to page 252, line 25.
Page 253, line 10 to page 257, line 1.
Page 259, line 22 to page 265, line 21.
Page 276, line 11 to page 285, line 1.
Page 287, line 12 to page 290, line 21.
Page 293, line 3 to page 298, line 2.
Page 304, line 1 to page 320, line 22.
Page 321, line 15 to page 326, line 23.
Page 329, line 12 to page 333, line 24.
Page 336, line 9 to page 341, line 13.
Page 357, line 16 to page 360, line 18.
Page 361, line 4 to page 363, line 16.
Page 367, line 1 to page 391, line 20.

5. Order Denying Motion to Strike Testimony
of Edward A. Bachman, Dr. Norman A. David, Dr.

Albert Holman, Dr. Thomas R. Montgomery, Dr. Frank Clancy and Dr. R. Philip Smith, and allowing Motion to Strike Testimony of F. R. Stipe.

6. Findings of fact and conclusions.
7. Order to cease and desist.
8. This designation of parts of the record.

LEO LEVENSON, Esquire

Spalding Building

Portland, Oregon

JAMES J. HAYDEN, Esquire

1323-18th Street, N.W.

Washington, D. C.

Attorneys for petitioners.

[Endorsed]: Filed June 17, 1942. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

RESPONDENT'S DESIGNATION OF ADDITIONAL PORTIONS OF TRANSCRIPT TO BE PRINTED

Respondent respectfully requests Paul P. O'Brien, Esq., Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, to print as the record for review in this proceeding in addition to or in clarification of petitioners' designation of portions of the record to be printed, the following:

1. Stipulation as to certain facts, dated Oct. 10, 1941.
2. Testimony as follows:

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Dr. R. Phillip Smith	342	4-24		
	343	12	344	14
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Mrs. Sloan Crofton	357	10-15		
Mrs. Ethel Turnham	360	22	361	3

3. Excerpts from Exhibits:

Com. Exs. S-A-B, 25-A-B, 26-A-B, 37-A-B, 39-A-B:

“A Valuable Prescription for Discriminating Women * * * produced for discriminating modern women who desire a sanitary and dependable douche to insure their personal hygiene. It is but recently that scientific research has developed new and improved methods to safeguard the health and happiness of married women. Endorsed by physicians and surgeons. M. D. Medicated Douche Powder not only cleans the vagina, and soothes the delicate membrane tissue, but it has the added advantage of the protective action of oxyquinolin sulphate, a

dependable safeguard. Because of its many other beneficial uses, 'M.D.' is also a very valuable household remedy * * * for cuts, sores and burns."

Com. Exs. 12, 13:

"M. D. Medicated Douche Powder, endorsed by leading physicians and surgeons, is a germicide—soothing and cooling to delicate membranes with the addition of oxyquinolin sulphate—a reliable safeguard."

Com. Ex. 12:

"Medical science now answers the problems of millions of women with a truly effective, reliable antiseptic powder."

Com. Ex. 15:

"It relieves women of fatigue and the annoying discharge, often occasioned by all day standing."

4. Exhibits:

Commission's Exhibit 20.

Respondents' (Petitioners') Exhibits 1 and 2.

5. This designation.

JOSEPH J. SMITH, JR.,

Assistant Chief Counsel, Federal Trade Commission.

[Endorsed]: Filed Mar. 10, 1943. Paul P. O'Brien, Clerk.

No. 10149

In the United States
Circuit Court of Appeals
For the Ninth Circuit

STANLEY LABORATORIES, INC., and
EDWARD A. BACHMAN, an individual
trading as STANLEY LABORATORIES and
as STILLMAN PRODUCTS COMPANY,

Petitioners,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

Petition for Review

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FILED

MAY 10 1943

PAUL F. O'BRIEN
CLERK



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vs.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR REVIEW

STATEMENT OF THE CASE

This is an original proceeding to review findings as to the facts and conclusions and order to cease and desist issued by the Federal Trade Commission against your petitioners Stanley Laboratories, Inc., and Edward A. Bachman, an individual trading as Stanley Laboratories and as Stillman Products Company. Among other things the Order prohibits your petitioners from using

the letters "MD" on any product of petitioners which has not been endorsed or recommended by the medical profession. The Order prohibits also the use of the picturization of a doctor, or a nurse, or a cross on any product of petitioners which has not been endorsed or recommended by the medical profession.

STATEMENT OF FACTS SHOWING JURISDICTION IN THIS COURT

This Court has jurisdiction to review the findings of the Commission and the Order to Cease and Desist under an Act of Congress approved September 26, 1914, entitled, "An Act to create a Federal Trade Commission, to define its powers and duties and for other purposes," and amendments thereto (U.S.C.A., Title 15, Par. 45) and also by reason of the fact that the acts complained of in the complaint of the Commission are alleged to have been committed within the Ninth Circuit. The petitioner Stanley Laboratories, Inc., is a corporation organized under the laws of Oregon with its principal place of business in Portland, Oregon; the petitioner, Edward A. Bachman, is an individual residing in Portland, Oregon.

The Order sought to be reviewed is dated the first day of April, 1942 (R. 30), and the petition to review was filed on the twenty-third day of May, 1942 (R. 340), within the sixty-day period allowed by law.

THE COMPLAINT

The complaint in this case is entitled "In the Matter of Stanley Laboratories, Inc., a corporation, and Edward A. Bachman, an individual trading as Stillman Products Company and as Stanley Laboratories," Docket No. 4130, before the Federal Trade Commission, and was issued on the seventh day of May, 1940.

To summarize briefly, the complaint alleges that Stanley Laboratories, Inc., and Edward A. Bachman, an individual, trading as the Stillman Products Company and as Stanley Laboratories are engaged in business, with their principal place of business in Portland, Oregon; that your petitioners sold and transported in interstate commerce certain drug products for feminine hygiene, including MD Medicated Douche Powder; that petitioners in the course of their said business disseminated false advertisements concerning their products; that petitioners by use of the letters "MD" on the products known as MD Medicated Douche Powder represented to the public that said product was either prescribed or compounded, or endorsed, or recommended by the medical profession; that said false advertisements cause a portion of the purchasing public to purchase said drug products and that said acts and practices are to the prejudice and injury of the public and constitute

unfair and deceptive acts and practices in commerce within the meaning of the Federal Trade Commission Act.

THE ANSWER

The answer states that petitioners are engaged in business as alleged in the complaint; that petitioners had long since discontinued the sale of all of said products in interstate commerce except the MD Powder; that they had discontinued the practices complained of long prior to the filing of the complaint and specifically had discontinued the same in accordance with the stipulation filed with the Commission on January 31, 1940; that they had published certain advertisements in connection with the sale of said products; that the use of the letters MD on the product MD Medicated Douche Powder was not intended to deceive or mislead and did not in fact deceive or mislead the public or possible purchasers of said product into the belief that MD Powder was endorsed or recommended by the medical profession as such; that MD Powder was in fact prescribed and used under the prescription of licensed physicians who are members of the medical profession; that petitioners have long since discontinued the use of the word "laboratories" both in advertising and in their corporate name; that your petitioners deny emphatically that the use of the letters MD has ever prejudiced or deceived

the public, or constituted unfair or deceptive acts or practices in interstate commerce within the meaning and intent of the Federal Trade Commission Act.

SUMMARY OF COMMISSION FINDINGS AND ORDER TO CEASE AND DESIST

On the first day of April, 1942, the Commission issued its Findings of Fact, Conclusions, and Order to Cease and Desist. The Commission found that there was not sufficient evidence in the record to warrant a finding involving any of the products of your petitioners except MD Medicated Douche Powder. The Commission found that your petitioners had published false advertisements concerning said MD Powder; that MD Powder has little or no therapeutic value; that the testimony of a bacteriologist with respect to the antiseptic and germicidal qualities of MD Powder was rejected with respect to its germicidal qualities on the grounds that the tests made in the laboratory were not similar to the use of the powder outside of the laboratory, and that hence the therapeutic value of MD Powder is limited to that of a mild antiseptic; that the use of the letters MD and/or the use of a cross and/or the use of the picturization of a doctor or a nurse has a tendency and capacity to cause members of the purchasing public to believe that said MD Powder is endorsed and recommended by the medical profession, and that the use of

the cross has a tendency and capacity to cause members of the purchasing public to believe that MD Powder is in some way endorsed or approved by the American Red Cross; that the use of the letters MD on said MD Powder, and the use of false advertisements does in fact mislead and deceive a substantial portion of the purchasing public to believe that said advertisements are true. The Commission concludes that the acts and practices alleged and found to exist are to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce within the meaning and intent of the Federal Trade Commission Act.

Under the terms of the Order of the Commission, your petitioners are required to cease and desist from alleging that MD Powder is dependable, or an effective, or reliable antiseptic powder, or other words of similar meaning; to cease and desist from using the letters MD in the trade name of MD Medicated Douche Powder or any other preparation which has not been endorsed or recommended by the medical profession; to cease and desist from using the picturization of a cross, a doctor, or a nurse on said MD Powder; and finally petitioners are required to file with the Commission within 60 days a report in writing setting forth in detail the manner and form in which they have complied with said Order.

ASSIGNMENT OF ERRORS

The respondent Federal Trade Commission erred:

1. In finding that MD Medicated Douche Powder is not a germicide but merely a mild antiseptic and may not be described as dependable or as an effective, reliable germicide and antiseptic powder.

2. In finding that MD Medicated Douche Powder has little or no therapeutic value.

3. In finding that the undisputed testimony of the bacteriologist was invalid in which he showed that under laboratory tests MD Medicated Douche Powder is a germicide.

4. In finding that in using the letters MD as part of the trade name of MD Medicated Douche Powder petitioners made false representations to the public that said product was either prescribed or compounded by physicians, and/or that it was endorsed or recommended by the medical profession, and that by including therewith the likeness of nurses or doctors and the figure of a cross the product simulates the American Red Cross emblem; and in finding that MD Powder was not prescribed or compounded by physicians; and in finding that the use of the letters MD has the tendency and capacity to cause members of the purchasing public to believe that said product is endorsed and recommended

by the medical profession; and in finding that the use of a cross has the tendency and capacity to cause members of the purchasing public to believe that the product is endorsed or approved by the American Red Cross; and in finding that the picture of a nurse or doctor in advertising said product has a tendency and capacity likewise to cause members of the purchasing public to believe that the product is in some way endorsed or approved by the American Red Cross or by the medical profession.

5. In finding that the advertisement of MD Medicated Douche Powder has the tendency and capacity, and does in fact, mislead and deceive a substantial portion of the purchasing public to believe that said advertisements are true, when as a matter of fact they are not true.

6. In concluding that the acts and practices of petitioners are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

7. In ordering petitioners to cease and desist from the use of the letters MD in the trade name of petitioners, or in any other manner, either alone or in conjunction with the picturization of a doctor, nurse, or

cross to designate any preparation of petitioners which has not been endorsed or recommended by the medical profession.

8. In ordering petitioners to cease and desist from the use and picturization of a cross or any other alleged simulation of the American Red Cross emblem, either alone or in conjunction with the picturization of a doctor or a nurse to designate or describe preparations or products of petitioners.

9. In ordering petitioners to file with the Commission within 60 days of the Order a report in writing setting forth in detail the manner and form in which have complied with the Commission order.

SUMMARY OF ARGUMENT

The statement of points upon which petitioners rely may be summarized for purposes of argument as follows:

Point I

The findings of fact, conclusions of law, and the order to cease and desist, are not based upon substantial evidence, but are based upon a distorted construction of the testimony, much of which was wholly inadmissible, and incredible.

Point II

The stipulation filed by respondents on January 31, 1940, makes a cease and desist order improper and unnecessary in this case.

Point III

The motion of respondents to strike certain testimony should have been granted in full.

ARGUMENT

These proceedings were brought by the Commission under Sections 5 and 12 of the Federal Trade Commission Act, 15 U.S.C.A., Pars. 45 and 52.

Point I

The findings of fact, conclusions of law and the order to cease and desist, are not based upon substantial evidence, but upon an unwarranted construction of the testimony, much of which was wholly inadmissible, and incredible.

While the findings of the Commission on facts are conclusive when supported by credible testimony, such testimony must be competent, substantial, and actually in the record.

In this case petitioners agree that Paragraphs One, Two, Three, Six and Eight of the Findings of Fact

are substantially correct, but petitioners contend that Paragraphs Four, Five, Seven and Nine of said Findings of Fact have no real basis in the testimony and should be set aside. Petitioners contend also that the Conclusions and Order of the Commission are erroneous and should be set aside, since they are based in part upon improper findings of fact.

Petitioners agree that the first sentence in Paragraph 4 of the Findings of Fact is substantially correct, but the rest of Paragraph 4 has no real basis in the testimony. *There is no proof whatever that MD Medicated Douche Powder was ever advertised as a preventative against conception, or as a prophylactic against disease generally.*

The testimony of Dr. M. E. Bachman, a brother of respondent, E. A. Bachman (R. 105-122), was based upon actual use by his patients and showed clearly that MD Powder is both antiseptic and germicidal and that it was safe and dependable as a douche. No witness testified from personal knowledge to the contrary. There is no testimony to show that the use of such words and phrases as "dependable," "insure," "reliable safeguard," etc., as stated in said Paragraph 4, has a tendency and capacity to make purchasers believe that the powder was a contraceptive or a prophylactic against disease. With many thousands of prospective purchasers

of MD Medicated Douche Powder in the United States, the Commission relies solely upon inadmissible testimony of doctors all of whom said they were not deceived but *thought* others *might* be deceived by MD Medicated Douche Powder advertising. None of these doctors qualified as an expert on *what other people thought* about MD Medicated Douche Powder. To formulate findings of fact based on such testimony is unsound and contrary to law. Expert testimony is made of firmer stuff. See 2 Wigmore, Evidence (3rd ed.), par. 661 et seq.; 7 Wigmore, Evidence (3rd ed.), par. 1962 et seq.; Westinghouse Electric & Mfg. Co. vs. Denver Tramway Co., 3 F. (2d) 285, 294; Farris vs. Interstate Circuit, Inc., 116 F. (2d) 409, 412; U. S. vs. Spaulding, 293 U. S. 498, 506.

We submit that the testimony of these experts on the reaction of the minds of the public, permits these experts to say in a Court of law what they think other people think. In other words, these experts are giving their opinion, not based upon any fact or credible evidence, but on their own conception of what other persons may believe. Naturally, these experts resent any intrusion upon their profession, and by their attitude they are frequently unable to give an unbiased and uncolored opinion. And to permit such experts to say what they

think other people think or believe is going beyond their prerogative as experts and should not be countenanced in a Court of law.

Paragraph Five of the Commission findings of fact should be set aside because of uncertainty, as well as for lack of proof in the testimony. The Commission finds that MD Medicated Douche Powder has little or no therapeutic value, and may or may not be a germicide. These statements show that the Commission did not find whether MD Medicated Douche Powder does or does not have therapeutic value, and the weasel-worded discussion in Paragraph Four as to whether the powder was a germicide or an antiseptic demonstrates the failure of the Commission to make a definite finding. There is no testimony by any Commission witness, based upon personal knowledge, on either point. There is at best merely some general opinion evidence given without actual experience or test of MD Medicated Douche Powder. It is axiomatic that the medical profession has considerable difference of opinion within its fold. Some of Commission's experts oppose the use of a douche (R. 257), while another sees no harm (R. 298).

Par. Seven of the Commission findings of fact have no real basis in the testimony. It is uncontradicted that MD Powder is a prescription prepared for E. A. Bachman, petitioner, by his brother Dr. M. E. Bachman of

Detroit, Michigan (R. 105-122). It is uncontradicted that Dr. Bachman (R. 105-122) prescribes it for his patients, as does Dr. Rienhart (R. 221-223). The Commission finding that the use of the letters "MD" either alone or in combination with the likeness of nurses, or doctors, or a cross, has a tendency and capacity to cause members of the purchasing public to believe that products so designated are endorsed or recommended by the medical profession, is based on testimony which is conjectural, inadmissible, incredible, and gives play to imagination.

All of the Commission doctors testified that they were not deceived by the use of the letters "MD" or by the use of the likeness of a nurse, or a doctor, or a cross, (R. 216, 251, 266, 300), but gave their opinion that other people were deceived, (R. 203, 267, 300, 305, 306). We submit that such clairvoyance should be rejected by a court of law as beyond the scope of the medical profession.

Dr. Albert Holman aptly expressed the attitude of all the doctors who testified that they were not deceived into thinking MD Medicated Douche Powder was endorsed by the medical profession when he said (R. 251):

"I know darned well it isn't."

Doctors are experts in their special fields of medical science, but their skill in the science of medicine *gives*

them no authority to reflect public reaction to newspaper or other advertising of MD Medicated Douche Powder.

Westinghouse Electric & Mfg. Co. v. Denver Tramway Co., 3 F. (2d) 285, 294.

Farris v. Interstate Circuit, Inc., 116 F. (2d) 409, 412.

U. S. v. Spaulding, 293 U. S. 498, 506.

In the Westinghouse case *supra*, the court rejected the so-called "expert" testimony of Dr. Wilcox on the plain ground he was not an expert on valuation, notwithstanding he had done considerable work in that field. In the case at bar the Commission offers the testimony of five doctors to the effect that the *public* (excluding doctors) is lead to believe that the letters "MD" on MD Medicated Douche Powder mean that the product is endorsed by the medical profession. None of these doctors attempted to qualify as an expert on the subject of what the public believes after reading the letters "MD" on MD Medicated Douche Powder, and it is submitted that it is patently unsound and contrary to the principles of law to predicate a finding, a conclusion, or an order on such testimony, most of which is founded on bias and prejudice.

In the Farris case, *supra*, the court said at page 412:

"Experts are entitled only to give in evidence their opinion as to conclusions of facts *within the range of their specialties*. . . . An expert is not per-

mitted to state his opinion on a matter of common knowledge; nor can he give his opinion as to conclusions from facts within his knowledge when that opinion answers the precise question for determination by the jury."

In the Farris case, *supra*, the appellate court rejected the testimony of two alleged experts on the grounds that they were not experts on the matters under inquiry. It would be difficult to conceive of a subject on which a medical doctor would be less qualified to speak as an expert than the subject of the mental reactions of the reading public.

In the Spaulding case, *supra*, Mr. Justice Stone points out at page 506 that the issue whether the respondent became totally and permanently disabled before his policy lapsed was the ultimate issue for the jury and that:

"The experts ought not to have been asked or allowed to state their conclusions on the whole case."

In this case, as in the Spaulding and other cases cited above, this court should reverse the Order of the Commission because the medical doctors who testified *were not experts* on the mental reactions of the public to the letters "MD" or MD Medicated Douche Powder, *and also because they stated conclusions on the very subject upon which the Commission was required to make a finding of fact.*

Five lay witnesses testified that Commission Exhibits 12 and 13 gave them the impression that doctors or the medical profession made or endorsed MD Powder. Cross examination of these witnesses disclosed that they had been visited by a Commission representative a year or more before the hearing, who showed them the letters "MD" on a toilet tissue advertisement and asked if those letters suggested that the product was endorsed by doctors or the medical profession. This method of laying the groundwork for similar testimony in the case at bar can hardly be approved in any court of law. It is unfair and inaccurate as a means of securing the reactions of the general public. Had witnesses been summoned from the streets, the shops, or the offices, and without previous conference or suggestion, been asked their reactions to Commission Exhibits 12 and 13, we might then have a bona fide and legal basis for a finding on the question whether the letters "MD" did in fact cause any member of the purchasing public to think that the product was made or endorsed by doctors or by the medical profession. In the present circumstances these petitioners respectfully take the position that the testimony of said lay witnesses for the Commission is unworthy of consideration or belief by a Court of law, particularly since none of them had ever bought douche powders in general or MD Medicated Douche Powder in particular.

A perusal of the testimony on cross examination of these lay witnesses for the Commission (R. 55-58, 61-65, 67-75, 91-94, 98-104) discloses: (1) That none of them had ever bought MD Medicated Powder or any other douche powder; (2) that none of them ever was deceived by the letters "MD," but that the letters gave the "impression" that doctors approved it; (3) that none of them had any idea why the letters "MD" gave such an impression except the letters made them think of a doctor. The testimony of the witness Paul Samuel Currin (R. 95-104) illustrates why respondents object to the use of similar testimony in this case. On cross examination (R. 98-104), Currin disclosed that about two years before the hearing he was visited by a Commission representative who showed him some toilet paper with the letters "MD" or something similar thereon and when asked by counsel what the representative asked him, replied:

"He asked me if I approved of it, and did I like it, and I said as far as I know, it was all right. I didn't know anything about it. I found it was—I remember looking at the thing, and I was talking to him, and he explained a little more about it. Then I said, 'I think you must have the wrong people', and then he explained to me about the situation." (R. 99.)

It is significant that the Commission offered not a single female witness to testify that she was a consumer of MD Powder and was deceived by the letters MD, or that she was not a consumer but had been deceived by the letters MD into thinking that the product was endorsed by the medical profession. This court may take judicial notice that women are sole users of douche powder, and are also the sole purchasers of the product MD powder. It is significant, also, that all of the women consumer witnesses who testified for the respondents, stated that they considered the letters MD merely a trade name (R. 226, 228, 229-231, 232-234, 309-310, 313) and that the letters "MD" did not give them the notion that the product was endorsed by the medical profession. The net result is that of all the potential consumers of MD powder, the Commission called none of them as witnesses, but relied upon the testimony of men who were neither users nor purchasers of douche powder and hence could never be deceived by the letters "MD" on such a product. Respondents submit that the uncontradicted testimony of the consumer witnesses offered by respondents, coupled with the failure of the Commission to offer testimony of any consumer witnesses, makes it apparent that the use of the letters "MD" on MD Medicated Douche Powder has not deceived nor do these letters have the capacity or tendency to deceive the public into believing that the product is endorsed by the medical profession.

The finding that the use of the figure of a cross has a tendency and capacity to cause members of the purchasing public to believe that MD Powder is in some way endorsed or approved by the American Red Cross is a fair sample of the unsoundness of the position of the Commission in this case. Entirely aside from the well-known fact that hundreds of other articles of merchandise are sold bearing a label which includes a cross similar to that used by the American Red Cross, this Court should take judicial notice of the historical background involving the cross as a symbol. The American Red Cross adopted the cross as a symbol in the year 1882. The same symbol has been used by others for centuries and the American Red Cross can have no monopoly in the use of that symbol when it is used on a commercial product. The red cross as a symbol was commonly used during the Middle Ages. It was a favorite in the Court of King Arthur. When Sir Galahad was about to set out on his famous journey, we are told that:

“Then a monk let him behind the alter, where the shield hung, as white as any snow, and with a blood red cross in the midst of it.” (King Arthur and the Knights of the Round Table, Grosse & Dunlap, p. 275.) See also pictorial frontispiece in this volume.

Paragraph 9 contains a finding that as a fact the use of alleged false advertisements has the capacity

and tendency to mislead and deceive the purchasing public and does in fact do so. The record contains no proof whatever that any person was ever deceived by any advertisement of MD Powder, but on the contrary is replete with proof that Commission witnesses and witnesses for petitioners alike were not deceived by any advertisement ever promulgated by petitioners. (R. 229, 232, 250-251, 286-287, 312-313.)

In the case of *F. T. C. vs. American Snuff Company*, 38 Fed. (2) 547, it is aptly stated:

“We can see no unfairness in the respondent using the word ‘Dental’ and the picture of a tooth on its packages.”

The Order to cease and desist is not supported by substantial evidence.

Petitioners have no objection to Pars. 1, 2, 3 and 6 of said Order, notwithstanding the fact that many of the provisions in those orders are unnecessary and not justified by the record. Petitioners insist most urgently, however, that there is no substantial or credible evidence in the record to warrant Par. 4 and Par. 5 of said Order.

The flimsy basis for Par. 4 of the Order is apparent from the language of the Order itself. The Commission says that petitioners may not use the letters “MD” on any preparation not endorsed or recommended by the

medical profession. The Commission knows from its own witness, Dr. David (R. 216, 217), that the medical profession does not directly endorse or recommend any product. The order, therefore, is based upon a condition impossible of fulfillment. Moreover, there is no proof that the use of the letters "MD" has ever deceived anybody into thinking that those letters meant endorsement by the medical profession. We contend that MD is a trade name meaning "Medicated Douche." The Commission testimony on this point has been outlined above, and may be summarized by saying that the doctors and the druggist testified emphatically that they were not deceived by the letters "MD" (while piously affirming that laymen were deceived, but without citing a single instance of such deception); and by saying that the lay witnesses who are alleged to be representative of the public were given the suggestion by a Commission representative. It is submitted that a fair reading of the testimony of these witnesses both on direct and cross-examination can lead only to the conclusion that the method of securing their testimony was so unfair as to make their statements worthless in the consideration of the issues in this case.

Paragraph 5 of the order to cease and desist has no basis in fact or in the testimony. It assumes that the emblem adopted by the Red Cross in 1882 is the sole

property of that organization, even if used on a commercial product, when in fact the emblem has been in common use for many centuries in connection with social objectives, and by commercial concerns for many years before the Commission was organized.

Further, there is no proof to show that anybody could be or has in fact been deceived by the use of the cross on MD Powder into thinking that it had any relation to the American Red Cross. This paragraph of the order represents an effort to cure an imaginary evil by depriving petitioners of a substantial right to employ a commonly used device to attract the eye of prospective purchasers, and to assist in remembering the product at a later date.

The provision in the same paragraph that the picturization of a doctor or nurse must not be used in connection with advertisements of MD Powder is equally unreasonable in that there is no proof that anybody was ever deceived by the use of such pictures, and in view of the common practice to attract the eye of the reader by such pictures.

Point II

The stipulation filed by petitioners on January 31, 1940, makes a cease and desist order improper and unnecessary in this case.

Petitioners rely on *John C. Winston Co. vs. F. T. C.*, 3 F. (2d) 961, cert. den. 269 U. S. 555, as an authority on all fours with this case with respect to the controlling facts and circumstances. Also the case of *L. B. Silver Co. vs. F. T. C.*, 292 Fed. 752. The general proposition that mere abandonment of a practice is not a defense to a complaint has no application to a case where the rule in the Winston case applies. In that case, as in the case at bar, the objectionable practice was discontinued on advice of counsel long before the complaint was filed; likewise in both cases a stipulation was actually filed showing that not only had the petitioners ceased and desisted from the objectionable practice but stipulated not to repeat such practices.

This case would probably never have come before the Commission except for the fact that petitioners declined to accept the dictum of the Commission that the use of the letters "MD" made the public believe that the product was endorsed by the medical profession.

Such cases as *Sears, Roebuck & Co. vs. F. T. C.*, 258 F. 307; *Guarantee Veterinary Co. vs. F. T. C.*, 285 F. 853, and numerous others of similar import are not in conflict with the Winston case, *supra*. In its brief in the Supreme Court of the United States in the Winston case, the Commission argued strenuously that the decision of the appellate court was inconsistent with the

Sears, Roebuck case and with the Guarantee case, *supra*, but the petition for certiorari filed by the Commission was denied.

Point III

The motion of petitioners to strike certain testimony should have been granted in full.

Petitioners' motion filed July 25, 1941, to strike certain testimony of Edward A. Bachman, F. R. Stipe, Drs. Norman A. David, Albert Holman, Thomas R. Montgomery, Frank Clancy and R. Philip Smith, should have been granted in full.

Mr. Bachman's testimony (R. 123-166) consisted largely of cross examination of the witness by Commission counsel on a report prepared by one White, an employee of the Commission, who interviewed Bachman.

The impropriety of cross examining Bachman upon a report made by White is evident. Cross-examination relates to matters covered in direct examination.

The testimony of Stipe (R. 202-203) was inadmissible since he was asked to testify as an expert although never qualified as such, but shown only to be a drug salesman.

Dr. David's testimony (R. 193-220) should be stricken because it was based on experiments with drugs other

than MD Powder and no proof was offered that the drugs were the same or similar; and for the further reason that he was asked to express his opinion based on his reading of the complaint rather than upon his knowledge of facts.

Dr. Holman's testimony (R. 236-243) was inadmissible because he, too, was asked to state his opinion of matter set forth in the complaint.

Dr. Montgomery's testimony (R. 259-264) was inadmissible because like the other doctors, he was asked and did express his opinion of matter set forth in the complaint, and because he had no authority to speak for other people in connection with the question whether the letters "MD" meant that the product was endorsed by the medical profession.

Dr. Clancy's testimony (R. 291-302) was inadmissible because he also testified on the basis of what he read in the complaint, and not upon his own knowledge, and for the further reason that he was not an expert on reading the minds of other people to determine whether they were deceived by the use of the letters "MD."

Dr. Smith's testimony (R. 303) was indamissible because he, like the other doctors called by the Commission, testified with reference to what appeared in

the complaint, and not from personal knowledge of the facts. He, too, presumed to testify that other people were deceived by the letters "MD," although he was not so deceived.

CONCLUSION

The cease and desist order of the Commission in this case should be set aside to the extent that petitioners may continue to use the letters "MD" in the sale of MD *Medicated Douche Powder*, and the cross and nurse.

Respectfully submitted,

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4
No. 10149

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

STANLEY LABORATORIES, INC., AND EDWARD A. BACHMAN,
AN INDIVIDUAL TRADING AS STANLEY LABORATORIES AND
AS STILLMAN PRODUCTS COMPANY, PETITIONERS

v.

FEDERAL TRADE COMMISSION, RESPONDENT

ON PETITION TO REVIEW AN ORDER OF THE FEDERAL TRADE
COMMISSION

BRIEF FOR RESPONDENT

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FEDERAL TRADE COMMISSION

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In the United States Circuit Court of Appeals for the Ninth Circuit

No. 10149

STANLEY LABORATORIES, INC., AND EDWARD A. BACHMAN,
AN INDIVIDUAL TRADING AS STANLEY LABORATORIES AND
AS STILLMAN PRODUCTS COMPANY, PETITIONERS

v.

FEDERAL TRADE COMMISSION, RESPONDENT

ON PETITION TO REVIEW AN ORDER OF THE FEDERAL TRADE
COMMISSION

BRIEF FOR RESPONDENT

I

STATEMENT OF THE CASE

1. The Pleadings

This is an administrative law proceeding arising upon a petition to review and set aside an order to cease and desist issued by the Federal Trade Commission, respondent, pursuant to a complaint charging petitioners with engaging in unfair and deceptive acts and practices in commerce in violation of the Federal Trade Commission Act.¹

¹ Pertinent provisions of the statute are set forth *infra* pp. 32-34.

The complaint (R. 1-11) issued May 7, 1940, alleged that petitioner Edward A. Bachman is president of, controls and directs the business activities, sales policies and practices of, and has his principal office and place of business at the same address as, petitioner Stanley Laboratories, Inc., an Oregon corporation having its principal place of business in Portland, Oregon; that petitioner Stanley Laboratories, Inc., and petitioner Edward A. Bachman, individually and while trading as Stillman Products Company and as Stanley Laboratories, were engaged in the sale and distribution in interstate commerce of a certain drug product for feminine hygiene designated "M. D. Medicated Douche Powder," in connection with which they disseminated false advertisements by means of the United States mails and in interstate commerce by various means (R. 2).² Typical examples of the representations made by petitioners were set out in the complaint (R. 3-5), and it was charged that by their use petitioners falsely represented that:

M. D. Medicated Douche Powder is a recent development of scientific research which is endorsed by leading physicians and surgeons; that said preparation is a competent and effective contraceptive; that said preparation is an antiseptic and germicide which will combat any

² Petitioners were also charged with disseminating false advertisements with respect to other products. No order was entered in that connection, however, and those allegations of the complaint are not here involved, the Commission having found that "there is not sufficient evidence in the record as to the dissemination of any particular advertisement * * * to warrant any finding involving" the products in question (R. 28).

form of bacteria ; that such preparation has competent remedial qualities for use on cuts, sores, and burns, and that said preparation will relieve fatigue and annoying discharge connected with the menstrual period. [R. 5-6.]

The complaint further charged that by means of the use of the letters "M. D." to designate the product "M. D. Medicated Douche Powder," together with the likenesses of nurses and doctors and the figure of a cross in simulation of the Red Cross emblem, petitioners falsely represented that their product is either prescribed or compounded by physicians or bears the endorsement or recommendation of the medical profession (R. 7).

By their answer (R. 11-15), filed June 15, 1940, petitioners admitted all of the material allegations of the complaint except the allegation to the effect that their use of the letters "M. D.," together with the likenesses of nurses and doctors and the figure of a cross in simulation of the Red Cross emblem, was misleading and deceptive.

At the initial hearing all the allegations of Paragraphs 1, 2, 3, 4, 7 and 8 of the complaint were stipulated to be true (R. 34-40), and without objection on the part of petitioners there was received in evidence (R. 46) a letter addressed to the Commission under date of June 21, 1940, in which petitioners, by their attorney, admitted all the allegations of Paragraphs 1, 2, 3, 4 and 7, and also the allegations of Paragraph 5 (Comm. Ex. 20, R. 47). Thus, by answer, stipulation and letter, petitioners three times admitted the allegations of Paragraphs 1, 2, 3, 4 and 7 of the

complaint and twice admitted the allegations of Paragraphs 5 and 8.

2. Findings as to the Facts and Order to Cease and Desist

After the taking of evidence on behalf of both the Commission and petitioners, the Commission, on April 1, 1942, made its findings as to the facts (R. 21-29), which accord with the allegations of the complaint. The Commission also found that the "use of a cross simulating the American Red Cross emblem in design, either alone or in combination with the letters 'M. D.' or with the picture of a nurse or doctor, has a tendency and capacity to cause members of the purchasing public to believe that the product is in some way endorsed or approved by the American Red Cross" (R. 28). Accordingly, the Commission concluded that petitioners' practices were in violation of the Federal Trade Commission Act and it entered an appropriate order to cease and desist. The only provisions questioned by petitioners (brief, p. 21) are those directing them to discontinue:

4. The use of the letters "M. D." in [petitioners'] trade name, or in any other manner, either alone or in conjunction with the picturization of a doctor, nurse, or cross, to designate or describe [petitioners'] preparation, or any other preparation which has not been endorsed or recommended by the medical profession;

5. The use of the picturization of a cross or any other simulation of the American Red Cross emblem, either alone or in conjunction with the picturization of a doctor or a nurse, to desig-

nate or describe [petitioners'] preparation.
R. [32-33.]

Petitioners thereafter filed their petition to review and set aside the Commission's order, to modify it in whole or in part, or to reopen the proceeding for the purpose of taking additional testimony (R. 340-347).

II

QUESTION PRESENTED

In their statement of points, petitioners set forth eight points upon which they intend to rely (R. 348-349), and in their brief make nine assignments of alleged error (pp. 7-9). In developing their argument, however, petitioners concede that Paragraphs 1, 2, 3, 6, and 8 and the first half of Paragraph 4 of the Commission's findings as to the facts are supported by substantial evidence (brief, pp. 10-11), and they confine their challenge to Paragraphs 5, 7 and 9 and the last half of Paragraph 4. After arguing at some length that these paragraphs of the findings are not supported by evidence, petitioners then state that they "have no objection to Pars. 1, 2, 3 and 6" of the Commission's order to cease and desist (brief, p. 21), and they conclude their brief with a prayer that the Commission's order be set aside only "to the extent that petitioners may continue to use the letters 'MD' in the sale of MD Medicated Douché Powder, and the cross and nurse" (brief, p. 27). The prohibitions thus referred to are those contained in Paragraphs 4 and 5 of the Commission's order (R. 32-33), and are based on the Commission's findings set forth in Paragraphs

7 and 9 of its findings as to the facts (R. 27-29), to the effect that petitioners' use of the letters "M. D.," the likenesses of nurses and doctors and the figure of a cross in simulation of the American Red Cross emblem are deceptive in that they tend to lead the public to believe that petitioners' preparation is endorsed by the medical profession and endorsed or approved by the American Red Cross.

In the circumstances, the only question presented, and therefore the only question which need be argued, is whether Paragraphs 7 and 9 of the Commission's findings as to the facts are supported by substantial evidence, and petitioners' argument with respect to the remainder of the Commission's findings, dealing principally with the lack of therapeutic value in their preparation, is entirely beside the point. We may say in passing, however, that not only were those findings supported by the testimony of five medical doctors whose qualifications as experts were not questioned by petitioners, but also by petitioners own judicial admissions (*supra*, pp. 3-4), and it is fundamental that "judicial admissions are proof possessing the highest possible probative value. Indeed, facts judicially admitted are facts established not only beyond the need of evidence to prove them, but beyond the power of evidence to controvert them." *Hill v. Federal Trade Commission*, 124 F. 2d 104, 106 (C. C. A. 5th, 1941).

We might also notice here petitioners' Point II (brief, pp. 23-25) to the effect that a certain so-called "stipulation" which they say they filed with the Commission makes the Commission's order "improper and

unnecessary.” Petitioners have filed no stipulation with the Commission. The document to which they refer (Comm. Ex. 17 A-C, not printed) is a letter to the Commission, written prior to the issuance of the complaint, in which petitioners *rejected* a stipulation to cease and desist submitted to them by the Commission,³ and offered to enter into a different stipulation which the Commission did not accept. The point which petitioners seek to make in this connection is not entirely clear, but seems to be that since they stated in their letter that they had discontinued most of the practices against which the Commission’s order is directed, the order is invalid. There are two answers to this. Discontinuance of an unlawful prac-

³ The execution of stipulations to cease and desist is a procedure devised by the Commission as a means of informally securing voluntary compliance with the Federal Trade Commission Act in certain types of cases in which proposed respondents are willing voluntarily to discontinue unlawful practices, thus terminating, without the necessity of formal proceedings, and with a minimum of public and private expense, many violations of law. The Commission’s Statement of Policy in this connection reads in part as follows: “Whenever the Commission shall have reason to believe that any person has been or is using unfair methods of competition or unfair or deceptive acts or practices in commerce, and that the interest of the public will be served by so doing, it may withhold service of complaint and extend to the person opportunity to execute a stipulation satisfactory to the Commission, in which the person, after admitting the material facts, promises and agrees to cease and desist from and not to resume such unfair methods of competition or unfair or deceptive acts or practices. All such stipulations shall be matters of public record, and shall be admissible as evidence of prior use of the unfair methods of competition or unfair or deceptive acts or practices involved in any subsequent proceeding against such person before the Commission.” Federal Trade Commission, Rules, Policy & Acts (January 11, 1943) 26-27.

tice is no defense in Federal Trade Commission proceedings;⁴ but even if it were, it would not be available to petitioners because they have not discontinued the practices to which the only contested provisions of the Commission's order relate; on the contrary, petitioners are insisting that the practices are lawful and that they have the right to continue them.

A third contention may be mentioned, petitioners' Point III (brief, pp. 25-27), to the effect that the Commission erred in denying petitioners' motion to strike certain testimony of several witnesses (R. 315-328, 18-20). The contention is frivolous. Petitioners' motion was granted as to the witness Stipe (R. 20)—although petitioners neglect to inform the Court of the fact in their brief—and no part of the testimony stricken was designated for inclusion in the printed record.⁵ The questioned testimony of the witness Bachman (R. 155-163), while plainly admissible, and

⁴ *Federal Trade Commission v. Goodyear Tire & Rubber Co.*, 304 U. S. 257, 260 (1938); *Philip R. Park, Inc. v. Federal Trade Commission*, — F. 2d — (C. C. A. 9th, 1943); *Juvenile Shoe Co. v. Federal Trade Commission*, 289 F. 57, 59-60 (C. C. A. 9th, 1923), cert. denied 263 U. S. 705 (1923); *Hershey Chocolate Corp. v. Federal Trade Commission*, 121 F. 2d 968, 971 (C. C. A. 3rd, 1941); *Perma-Maid Co. v. Federal Trade Commission*, 121 F. 2d 282, 284 (C. C. A. 6th, 1941); *Educators Association v. Federal Trade Commission*, 108 F. 2d 470, 473 (C. C. A. 2nd, 1939); *Federal Trade Commission v. Wallace*, 75 F. 2d 733, 738 (C. C. A. 8th, 1935); *Federal Trade Commission v. Good-Grape Co.*, 45 F. 2d 70, 72 (C. C. A. 6th, 1930).

⁵ Compare petitioners' motion at R. 316 with designation at R. 354 and testimony printed at R. 191-193. The page references in petitioners' motion related to the typewritten transcript of the testimony, of course, not to the printed record, but the transcript pagination is bracketed in bold face in the latter.

for the most part admitted without objection on the part of petitioners, has nothing to do with the single issue presented for review. All of the remaining testimony referred to in petitioners' motion, that of the Commission's expert witnesses, was also clearly admissible, most of it was admitted without objection on the part of petitioners, and every word of it pertinent to the sole issue here was either so admitted or consisted of testimony given on cross-examination by petitioners' own counsel.⁶ In the circumstances, there is no basis whatever for petitioners' contention that the Commission erred in denying their motion,⁷ and it may also be noted that even if there were, it is too

⁶ The pertinent testimony consisted of statements by the Commission's doctors as to how they believed the public would interpret petitioners' advertisements. It may be assumed, to borrow petitioners' language, that none of the doctors was "an expert on reading the minds of other people to determine whether they were deceived by the use of the letters 'MD'" (brief, p. 26). But the nature of their work and the character of their association with the public gave them special knowledge which peculiarly fitted them to express a helpful, and therefore competent, opinion upon the question of how petitioners' advertisements were likely to be read by those to whom they were addressed. See 7 Wigmore, Evidence (3rd ed. 1940) §§ 1923, 1976; 2 *id.* § 661; Rogers, Expert Testimony (3rd ed. 1941) 44-45, and *cf.* *Benton Announcements v. Federal Trade Commission*, 130 F. 2d 254 (C. C. A. 2nd, 1942) and *Loonen v. Deitsch*, 189 F. 487, 491 (S. D. N. Y. 1911).

⁷ Testimony admitted without objection cannot be made the basis of complaint on appeal. *Lane v. Federal Trade Commission*, 130 F. 2d 48, 51 (C. C. A. 9th, 1942); *Reidy v. Myntti*, 116 F. 2d 725, 728 (C. C. A. 9th, 1940); *Collins v. Streitz*, 95 F. 2d 430, 436-437 (C. C. A. 9th, 1938), cert. denied 305 U. S. 608 (1938); *Opp Cotton Mills v. Administrator*, 312 U. S. 126, 155 (1941); *Kansas City Southern Ry. v. Albers Commission Co.*, 223 U. S. 573, 595-596 (1912).

well settled to require argument that error in the admission of evidence does not invalidate an administrative order to cease and desist.⁸ Insofar as questions respecting the evidence are concerned, the courts' inquiry in administrative proceedings, such as this, is not whether evidence was properly or improperly admitted, but whether there is substantial evidence to support the administrative findings. If there is, the erroneous admission of evidence is immaterial. Since there was an abundance of substantial evidence to support the Commission's findings here, its admission of the evidence of which petitioners complain, even if erroneous, furnishes no ground for setting its order aside. *Hills Bros. v. Federal Trade Commission*, 9 F. 2d 481, 484 (C. C. A. 9th, 1926), cert. denied 270 U. S. 662 (1926); *Keller v. Federal Trade Commission*, 132 F. 2d 59, 61 (C. C. A. 7th, 1942); *Arkansas Wholesale Grocers' Assn. v. Federal Trade Commission*, 18 F. 2d 866, 871 (C. C. A. 8th, 1927), cert. denied 275 U. S. 533 (1927).

We restate the single issue presented, namely: Whether there is substantial evidence to support the Commission's findings that petitioners' use of the letters "M. D.," the likenesses of nurses and doctors and the figure of a cross in simulation of the American Red Cross emblem are deceptive in that they tend to lead the public to believe that petitioners' preparation is

⁸ *Opp Cotton Mills v. Administrator*, 312 U. S. 126, 155 (1941); *Consolidated Edison Co. v. National Labor Relations Board*, 305 U. S. 197, 229-230 (1938); *Tagg Brothers v. United States*, 280 U. S. 420, 442 (1930); *United States v. Abilene & Southern Ry.*, 265 U. S. 274, 288 (1924).

endorsed by the medical profession and endorsed or approved by the American Red Cross.

III

ARGUMENT

The applicable law is well settled.

The Commission's findings as to the facts, if supported by evidence, are conclusive. The statute so provides,⁹ this Court has often so held,¹⁰ and petitioners so concede (brief, p. 10). It is likewise settled that the "weight to be given to the facts and circumstances admitted, as well as the inferences reasonably to be drawn" therefrom are for the Commission, *Federal Trade Commission v. Pacific States Paper Trade Assn.*, 273 U. S. 52, 63 (1927), and the "possibility of drawing either of two inconsistent inferences from the evidence" does not prevent the Commission from drawing one of them. *National Labor Relations Board v. Nevada Consolidated Copper Corp.*, 316 U. S. 105, 106 (1942).

The rule applies notwithstanding the fact that the findings relate to matters upon which there is a con-

⁹ Federal Trade Commission Act, § 5 (c); 52 Stat. 113; 15 U. S. C. A. § 45 (c); *Federal Trade Commission v. Standard Education Society*, 302 U. S. 112, 117 (1937); *Federal Trade Commission v. Algoma Lumber Co.*, 291 U. S. 67, 73 (1934); *Federal Trade Commission v. Pacific States Paper Trade Assn.*, 273 U. S. 52, 63 (1927).

¹⁰ *Philip R. Park, Inc. v. Federal Trade Commission*, — F. 2d — (C. C. A. 9th, 1943); *American Medicinal Products, Inc. v. Federal Trade Commission*, — F. 2d — (C. C. A. 9th, 1943); *Lane v. Federal Trade Commission*, 130 F. 2d 48, 50 (C. C. A. 9th, 1942); *Alberty v. Federal Trade Commission*, 118 F. 2d 669, 670 (C. C. A. 9th, 1941), cert. denied 314 U. S. 630 (1941); *Electro Thermal Co. v. Federal Trade Commission*, 91 F. 2d 477, 479 (C. C. A. 9th, 1937), cert. denied 302 U. S. 748 (1937).

flict in the evidence,¹¹ as it is for the Commission to determine the credibility of the witnesses and the weight to be accorded to their testimony.¹² It applies also to the Commission's findings as to the meaning of advertisements, for the meaning of advertisements

¹¹ *Federal Trade Commission v. Algoma Lumber Co.*, 291 U. S. 67, 73, 77 (1934); *John J. Fulton Co. v. Federal Trade Commission*, 130 F. 2d 85, 86 (C. C. A. 9th, 1942), cert. denied 317 U. S. 679 (1942); *Alberty v. Federal Trade Commission*, 118 F. 2d 669, 670 (C. C. A. 9th, 1941), cert. denied 314 U. S. 630 (1941); *Aronberg v. Federal Trade Commission*, 132 F. 2d 165, 170 (C. C. A. 7th, 1942); *Benton Announcements v. Federal Trade Commission*, 130 F. 2d 254 (C. C. A. 2nd 1942); *D. D. D. Corporation v. Federal Trade Commission*, 125 F. 2d 679, 680-682 (C. C. A. 7th, 1942); *Neff v. Federal Trade Commission*, 117 F. 2d 495, 497 (C. C. A. 4th, 1941); *Dr. W. B. Caldwell, Inc. v. Federal Trade Commission*, 111 F. 2d 889, 891 (C. C. A. 7th, 1940); *Justin Haynes & Co. v. Federal Trade Commission*, 105 F. 2d 988, 989 (C. C. A. 2nd, 1939), cert. denied 308 U. S. 616 (1939); *Fiolet Sales Co. v. Federal Trade Commission*, 100 F. 2d 358, 359 (C. C. A. 2nd, 1938); *L. & C. Mayers Co. v. Federal Trade Commission*, 97 F. 2d 365 367 (C. C. A. 2nd, 1938); *E. Griffiths Hughes, Inc. v. Federal Trade Commission*, 77 F. 2d 886, 887 (C. C. A. 2nd, 1935), cert. denied 296 U. S. 617 (1935).

¹² *Aronberg v. Federal Trade Commission*, 132 F. 2d 165, 170 (C. C. A. 7th, 1942); *Keller v. Federal Trade Commission*, 132 F. 2d 59, 60-61 (C. C. A. 7th, 1942); *Dr. W. B. Caldwell, Inc. v. Federal Trade Commission*, 111 F. 2d 889, 891 (C. C. A. 7th 1940); *Wholesale Grocers' Assn. v. Federal Trade Commission*, 277 F. 657, 663 (C. C. A. 5th, 1922).

This Court has frequently held that it is for the jury, or the court below in the absence of a jury, to pass upon the credibility and the weight of the testimony of witnesses. *E. g.*, *Cherry-Burrell Co. v. Thatcher*, 107 F. 2d 65, 69 (C. C. A. 9th, 1939); *United States v. Alger*, 68 F. 2d 592 (C. C. A. 9th, 1934); *United States v. Dudley*, 64 F. 2d 743, 745 (C. C. A. 9th, 1933); *United States v. Albano*, 62 F. 2d 677, 681 (C. C. A. 9th, 1933); *United States Fidelity & Guaranty Co. v. Leong Dung Dye*, 52 F. 2d 567, 570 (C. C. A. 9th, 1931), cert. denied 285 U. S. 537 (1932).

to the public is itself a question of fact,¹³ and the Commission's judgment as to their meaning and their false and deceptive character is conclusive unless palpably wrong. See *Brougham v. Blanton Manufacturing Co.*, 249 U. S. 495, 490-500 (1919); *Houston v. St. Louis Independent Packing Co.*, 249 U. S. 479, 484 (1919); *Farley v. Simmons*, 99 F. 2d 343, 346 (App. D. C., 1938), cert. denied 305 U. S. 651 (1938).¹⁴

¹³ *Leach v. Carlile*, 258 U. S. 138, 139-140 (1922); *Brougham v. Blanton Manufacturing Co.*, 249 U. S. 495, 499-500 (1919); *Houston v. St. Louis Independent Packing Co.*, 249 U. S. 479, 484 (1919); *Farley v. Heininger*, 105 F. 2d 79, 81-82 (App. D. C., 1939), cert. denied 308 U. S. 587 (1939); *Farley v. Simmons*, 99 F. 2d 343, 346 (App. D. C., 1938), cert. denied 305 U. S. 651 (1938); *Chichester Chemical Co. v. United States*, 49 F. 2d 516, 518 (App. D. C., 1931); *Food and Drugs Act—Misbranding Sugar*, 34 Ops. Att'y Gen. 221, 227 (1924); *Duffy-Mott Co. v. United States*, 285 F. 737 (C. C. A. 3rd, 1923); *Eleven Gross Packages v. United States*, 233 F. 71, 73 (C. C. A. 3rd, 1916); *F. B. Washburn & Co. v. United States*, 224 F. 395, 399-400 (C. C. A. 1st, 1915); *United States v. American Laboratories*, 222 F. 104, 108-109 (E. D. Pa., 1915); *Putnam v. Morgan*, 172 F. 450 (S. D. N. Y., 1909); *Missouri Drug Co. v. Wyman*, 129 F. 623, 629 (C. C. E. D. Mo., 1904). See also *Sebrone Company v. Federal Trade Commission*, 135 F. 2d 676, 678-679 (C. C. A. 7th, 1943); *Aronberg v. Federal Trade Commission*, 132 F. 2d 165, 168 (C. C. A. 7th, 1942); *Federal Trade Commission v. Civil Service Training Bureau*, 79 F. 2d 113, 114-115 (C. C. A. 6th, 1935).

¹⁴ *Bates & Guild Co. v. Payne*, 194 U. S. 106, 108-109 (1904); *Farley v. Heininger*, 105 F. 2d 79, 81-82 (App. D. C., 1939), cert. denied 308 U. S. 587 (1939); *Putnam v. Morgan*, 172 F. 450 (S. D. N. Y., 1909); *Missouri Drug Co. v. Wyman*, 129 F. 623, 629 (C. C. E. D. Mo., 1904). See also *Leach v. Carlile*, 258 U. S. 138, 139-140 (1922), and *cf. Rosen v. United States*, 161 U. S. 29, 42-43 (1896); *Chichester Chemical Co. v. United States*, 49 F. 2d 516, 518 (App. D. C., 1931); *United States v. Stobo*, 251 F. 689, 693-694 (D. Del., 1918); *Eleven Gross Packages v. United States*, 233 F. 71, 73-74 (C. C. A. 3rd, 1916); *United States v. American Laboratories*, 222 F. 104, 108-109 (E. D. Pa., 1915).

IN determining the meaning of advertisements it is to be borne in mind that "The law is not made for the protection of experts, but for the public—that vast multitude which includes the ignorant, the unthinking and the credulous, who, in making purchases, do not stop to analyze, but are governed by appearances and general impressions." *Florence Manufacturing Co. v. J. C. Dowd & Co.*, 178 F. 73, 75 (C. C. A. 2nd, 1910). Deception may result from "implications reasonably derived * * * by the reader, as well as [from] express words," *Stunz v. United States*, 27 F. 2d 575, 579 (C. C. A. 8th, 1928),¹⁵ for the "buying public does not ordinarily carefully study or weigh each word in an advertisement. The ultimate impression upon the mind of the reader arises from the sum total of not only what is said but also of all that is reasonably implied," and advertisements "are intended not 'to be carefully dissected with a dictionary at hand, but rather to produce an impression upon' prospective purchasers," *Aronberg v. Federal Trade Commission*, 132 F. 2d 165, 167 (C. C. A. 7th, 1942), having "no other object than to draw attention to the article to be sold." *Rast v. Van Deman & Lewis*, 240 U. S. 342, 365 (1916). They are therefore to be read as they would be read by the public to whom they are ad-

¹⁵ "The skilful advertiser can mislead the consumer without misstating a single fact. The shrewd use of exaggeration, innuendo, ambiguity and half-truth is more efficacious from the advertiser's standpoint than factual assertions." Handler, *The Control of False Advertising Under the Wheeler-Lea Act*, 6 *Law & Contemp. Prob.* 91, 99 (1939).

dressed,¹⁶ and the "fact that a false statement may be obviously false to those who are trained and experienced does not change its character, nor take away its power to deceive others less experienced. There is no duty resting upon a citizen to suspect the honesty of those with whom he transacts business. Laws are made to protect the trusting as well as the suspicious." *Federal Trade Commission v. Standard Education Society*, 302 U. S. 112, 116 (1937).

Advertisements which are ambiguous or capable of two meanings, one of which is false, are therefore misleading,¹⁷ and advertisements which create a false impression, although literally true, are unlawful,¹⁸ for

¹⁶ *Aronberg v. Federal Trade Commission*, 132 F. 2d 165, 167-168 (C. C. A. 7th, 1942); *D. D. D. Corporation v. Federal Trade Commission*, 125 F. 2d 679, 681-682 (C. C. A. 7th, 1942); *Ford Motor Co. v. Federal Trade Commission*, 120 F. 2d 175, 182 (C. C. A. 6th, 1941), cert. denied 314 U. S. 668 (1941); *Consolidated Book Publishers v. Federal Trade Commission*, 53 F. 2d 942, 944 (C. C. A. 7th, 1931), cert. denied 286 U. S. 553 (1932); *Newton Tea & Spice Co. v. United States*, 288 F. 475, 479 (C. C. A. 6th, 1923); *Royal Baking Powder Co. v. Emerson*, 270 F. 429, 435, 440-441 (C. C. A. 8th, 1920), appeal dismissed 260 U. S. 752 (1922); *Hall v. United States*, 267 F. 795, 797 (C. C. A. 5th, 1920); *Libby, McNeill & Libby v. United States*, 210 F. 148, 150-151 (C. C. A. 4th, 1913).

¹⁷ *United States v. Ninety-Five Barrels*, 265 U. S. 438, 442-443 (1924); *Ford Motor Co. v. Federal Trade Commission*, 120 F. 2d 175, 182 (C. C. A. 6th, 1941), cert. denied 314 U. S. 668 (1941).

¹⁸ *United States v. Ninety-Five Barrels*, 265 U. S. 438, 442-443 (1924); *General Motors Corp. v. Federal Trade Commission*, 114 F. 2d 33, 35-36 (C. C. A. 2nd, 1940), cert. denied 312 U. S. 682 (1941); *Farley v. Simmons*, 99 F. 2d 343, 345-346 (App. D. C., 1938), cert. denied 305 U. S. 651 (1938); *Taylor v. United States*, 80 F. 2d 604, 605-606 (C. C. A. 5th, 1936), cert. denied 297 U. S. 708 (1936); *Consolidated Book Publishers v. Federal Trade Com-*

“Words and sentences may be literally and technically true and yet be framed in such a setting as to mislead or deceive.” *Bockenstette v. Federal Trade Commission*, 134 F. 2d 369, 371 (C. C. A. 10th, 1943); *Sebrone Company v. Federal Trade Commission*, 135 F. 2d 676, 679 (C. C. A. 7th, 1943).

The Federal Trade Commission Act does not require a showing of fraud or actual falsity; it condemns every advertisement of medical preparations “which is *misleading* in a material respect,” and whether or not an advertisement is misleading is to be determined not merely by reference to representations actually made, but by reference to those “suggested” as well.¹⁹ Representations which are misleading, although made innocently and in good faith, may be ordered discontinued,²⁰ and actual deception of pur-

mission, 53 F. 2d 942, 944 (C. C. A. 7th, 1931), cert. denied 286 U. S. 553 (1932); *Royal Baking Powder Co. v. Emerson*, 270 F. 429, 440-441 (C. C. A. 8th, 1920), appeal dismissed 260 U. S. 752 (1922).

¹⁹ The statute provides, “The term ‘false advertisement’ means an advertisement * * * which is misleading in a material respect; and in determining whether any advertisement is misleading, there shall be taken into account * * * representations made or suggested * * *.” Federal Trade Commission Act, § 15 (a), 52 Stat. 116; 15 U. S. C. A. § 55 (a).

²⁰ *Federal Trade Commission v. Algoma Lumber Co.*, 291 U. S. 67, 81 (1934); *D. D. D. Corporation v. Federal Trade Commission*, 125 F. 2d 679, 682 (C. C. A. 7th, 1942); *Pep Boys v. Federal Trade Commission*, 122 F. 2d 158, 161 (C. C. A. 3rd, 1941); *Gimbel Brothers v. Federal Trade Commission*, 116 F. 2d 578, 579 (C. C. A. 2nd, 1941); *L. & C. Mayers Co. v. Federal Trade Commission*, 97 F. 2d 365, 367 (C. C. A. 2nd, 1938); *Fairyfoot Products Co. v. Federal Trade Commission*, 80 F. 2d 684, 687 (C. C. A. 7th, 1935).

chasers need not be shown in Federal Trade Commission proceedings; ²¹ business methods having a "capacity to deceive" are unlawful, *Federal Trade Commission v. Algoma Lumber Co.*, 291 U. S. 67, 81 (1934), ²² and "If the Commission, having discretion to deal with these matters, thinks it best to insist upon a form of advertising clear enough so that, in the words of the prophet Isaiah, 'wayfaring men, though fools, shall not err therein,' it is not for the courts to revise its judgment." *Aronberg v. Federal Trade Commission*, 132 F. 2d 165, 167 (C. C. A. 7th, 1943); *General Motors Corp. v. Federal Trade Commission*, 114 F. 2d 33, 36 (C. C. A. 2nd, 1940), cert. denied 312 U. S. 682 (1941).

A number of petitioners' advertisements were received in evidence.²³ Most of them include a picture

²¹ *Bockenstette v. Federal Trade Commission*, 134 F. 2d 369, 371 (C. C. A. 10th, 1943); *Pep Boys v. Federal Trade Commission*, 122 F. 2d 158, 161 (C. C. A. 3rd, 1941); *Federal Trade Commission v. Hires Turner Glass Co.*, 81 F. 2d 362, 364 (C. C. A. 3rd, 1935); *Brown Fence & Wire Co. v. Federal Trade Commission*, 64 F. 2d 934, 936 (C. C. A. 6th, 1933); *Masland Durable Leather Co. v. Federal Trade Commission*, 34 F. 2d 733, 737-738 (C. C. A. 3rd, 1929); *Federal Trade Commission v. Balme*, 23 F. 2d 615, 621 (C. C. A. 2nd, 1928), cert. denied 277 U. S. 598 (1928); *Sears, Roebuck & Co. v. Federal Trade Commission*, 258 F. 307, 311 (C. C. A. 7th, 1919).

²² *D. D. D. Corporation v. Federal Trade Commission*, 125 F. 2d 679, 682 (C. C. A. 7th, 1942); *Ford Motor Co. v. Federal Trade Commission*, 120 F. 2d 175, 181 (C. C. A. 6th, 1941), cert. denied, 314 U. S. 668 (1941); *Notaseme Hosiery Co. v. Straus*, 201 F. 99, 100 (C. C. A. 2nd, 1912).

²³ Commission Exhibits 8, 12, 13, 14, 15, 31, and 36 (physical exhibits) are typical. Excerpts from advertisements are printed at R. 43 and 52, and Commission Exhibits 44 and 51 (physical exhibits) are containers in which petitioners' preparation is sold.

similar to that appearing on Commission Exhibit 1 (R. 169), prominently featuring the letters "M. D.," a cross similar in design to the emblem of the American Red Cross,²⁴ and the likeness of the head of a trained nurse inset within the arms of the cross. They include such statements as:

Medical science now answers the problems of millions of women with a truly effective, reliable antiseptic powder. [Comm. Ex. 12, R. 43.]

A Valuable Prescription for Discriminating Women. * * * It is but recently that scientific research has developed new and improved methods to safeguard the health and happiness of married women. Endorsed by physicians and surgeons. [Comm. Ex. 8 A-B, R. 52.]

Today medical science offers a truly effective germicide * * *. Harmless to delicate tissues, M. D. is a reliable medicated douche powder—a real tribute to the accomplishment of gynecological research. * * * Ask your druggist today for M. D.—the economical, scientifically approved, medicated douche powder * * *. [Comm. Ex. 36, physical exhibit.]

M. D. Medicated Douche Powder, endorsed by leading physicians and surgeons, is a * * * reliable safeguard. [Comm. Ex. 12, R. 43.]

Typical advertisements and the container in which petitioners' preparation is sold were shown to a number of Commission witnesses, expert and lay, who were questioned concerning the meaning and impression to be gathered from them. Their testimony may be summarized as follows.

²⁴ The cross is not colored.

Dr. Norman A. David, professor of pharmacology at the University of Oregon School of Medicine (R. 193), testified that the letters "M. D." stand for Doctor of Medicine, Medical Doctor, and "naturally * * * one would think" from the manner of their use by petitioners that petitioners' product "is endorsed by doctors," that it "is possibly recommended by a physician" (R. 203), and "is in some way connected with the Doctors of Medicine" (R. 216). He stated that he himself would not be deceived, of course, as he knew that no reputable physician would endorse the product (R. 203, 216, 220), but his "reaction" to petitioners' use of the letters "M. D." "was that it was * * * a method of advertising and appealing to the lay people who through ignorance may think it was endorsed by physicians. * * * the inference is that it has the backing of the medical profession," an inference heightened by petitioners' use of "the nurse and the cross" (R. 220-221).

Dr. Albert Holman, of Portland, Oregon, a physician specializing in obstetrics and gynecology (R. 235), testified that he believed a person seeing petitioners' container (Comm. Ex. 51), carrying the picture of the head of a trained nurse inset upon a cross between the letters "M D," would think "that it is recommended by the medical profession" (R. 240).

Dr. Thomas R. Montgomery, a practicing urologist (R. 259), testified that he thought petitioners' container "definitely would be considered misleading to the average person. * * * I think they would be led to suppose that that was endorsed by or produced

by an M. D. and sponsored by the * * * members of the Medical Society. I think that is deceiving" (R. 261). He said that the "insignia" M. D. "suggests that [petitioners' preparation] is a medical product," that he assumed "that is why those letters are there" (R. 265) and that the cross "applies to Red Cross" (R. 266).

Dr. Frank J. Clancy, a physician and surgeon of Seattle, Washington (R. 291), questioned by petitioners' counsel as to whether he thought petitioners' container (Comm. Ex. 51) indicated "any recommendation by the medical profession" (R. 300), testified:

I think it implies that, all right, subtly, to a great many people who do not read things carefully * * *. I think that it implies * * * that doctors of medicine have put their stamp of approval on it, or have something to do with it, or it drags in the medical profession by implication at least * * *. [R. 300.]

Asked whether "the letters MD on toilet paper * * * give you the impression it is put out by doctors," Dr. Clancy replied:

I think that is the impression [the manufacturers] are trying to give, that it is backed up by the medical profession or that the medical profession has something to do with it or endorses it or approves it. [R. 301.]

He testified further that petitioners, by using the letters "M. D.," are "implying that doctors have something to do with [the product]. You are dragging doctors in by the ears * * *. I think that it is deceptive" (R. 302).

Dr. Phillip Smith, a physician and surgeon of Seattle, Washington (R. 303), testified that "glancing at [petitioners' container] you would think the nurses approved [the product], and the Red Cross probably approved it, too, because [petitioners] copied that type of cross," and that the effect of the letters "M. D." is "to make the public jump to the conclusion the doctors are sponsoring" the preparation (R. 305).

Mr. Charles Marcellino, a shoe repairer of Mt. Rainier, Maryland (R. 53), testified that petitioners' advertisements led him to believe that their product is "endorsed by the doctors," by the "medical profession," for the "simple reason that it has the M. D. and a cross. You take a doctor's name—they all have an M. D. on it, and that would suggest that to me" (R. 54-55).

Mr. George H. Candey, engaged in the hardware business in Washington, D. C. (R. 59), was shown a specimen of petitioners' advertising matter and asked "what impression that conveys to your mind as to the products advertised" (R. 59). He replied:

Well, the first impression and the most outstanding one to my mind would be, if not necessarily put out by doctors, that it was certainly endorsed by doctors. [R. 59.]

Mr. Candey was impressed by petitioners' use of "a picture of a nurse" and by "the cross," as well as the advertisements' specific reference to petitioners' products being "endorsed or approved by a doctor or physician" (R. 60), and he said that the letters "M. D." did not suggest anything to him "outside of

doctors," that "is the first thing that would come to my mind, because it is the most prominent usage of those two letters" (R. 64). He referred to petitioners' cross as "the Red Cross" (R. 64).

Mr. John W. Burroughs, a service station attendant of Washington, D. C. (R. 66), testified that "to look at [petitioners' advertisements] with the 'M. D.' and a cross and a picture of a nurse, I would say it was signed by doctors and medical association, and that [petitioners' product] was a good powder, approved by them" (R. 66). He said that "a picture of a nurse and a cap, and then a cross and 'M. D.,' would just bring that to my mind. Without thinking of anything, it would automatically just bring that to my mind" (R. 69). Upon reading *all* of one of the advertisements about which he was questioned, Mr. Burroughs said that he would not think it was "signed" by a doctor, but he would still think the advertisement meant that petitioners' product had been approved by the medical profession because of the advertisement's use of the letters "M. D." and the picture of a cross and a nurse (R. 71-76), stating, "I would still say, if it had that 'M. D.' that a medical association had something to do with it * * * had approved it" (R. 72).

Mr. Francis J. O'Donnell, a druggist of Washington, D. C. (R. 76), was asked what impression as to petitioners' product their advertisements had upon his mind, and replied, "It looks like to me it was put out by a doctor or endorsed by a doctor or by a medical society" (R. 77, 78). He gathered this impres-

sion from petitioners' references to "Endorsed By Leading Physicians and Surgeons" (R. 79), and their use of pictures of doctors and nurses, a cross and the letters "M. D." (R. 77-79), stating, "or else the 'M. D.' wouldn't be on there" (R. 78) "what is the 'M. D.' on there for * * * other than to create that impression" (R. 79). Mr. O'Donnell said that "the looks of the package, the looks of the advertising," leads the "public to believe" that the medical profession had endorsed petitioners' preparation (R. 83), and that he knew from his experience with customers, from remarks they made every day (R. 87), that such advertising as petitioners' was misleading (R. 83), stating, "The women tell me when they come in to buy these things, 'It must be good; it is endorsed by doctors,' " (R. 85). Mr O'Donnell further testified that "at least 50 or 60 per cent, anyway" of douche powder sold in neighborhood drug stores is purchased by men (R. 81).²⁵

Mr. Robert E. Taylor, a coca-cola salesman of Washington, D. C. (R. 87), testified that because of the use of the "cross and the 'M. D.' and the nurse" (R. 89), petitioners' advertising gave him the impression that it was approved and endorsed by the medical profession (R. 88-90, 92, 94).

Mr. Paul S. Currin, sales manager for a Washington, D. C., automobile concern (R. 95), testified that the impression conveyed to his mind by petitioners'

²⁵ We invite attention to this fact in view of the statement in petitioners' brief that the "court may take judicial notice that women are * * * the sole purchasers" of their powder (p. 19).

use of "M. D." and the "cross, with the nurse on it" was that petitioners' product was approved "by the medical society or doctors and professional surgeons" (R. 95-96, 97), "just looking at [petitioners' advertisements] and seeing 'M. D.' * * * and the picture of the red cross and the nurse, naturally you would think it was approved by doctors" (R. 100, 101, 102).²⁶

In this state of the record, it is difficult for us to understand how petitioners can pretend seriously to assert to a busy Court that there is no evidence to support the Commission's findings that their use of the letters "M. D.," and pictures of nurses, a doctor and a cross are not deceptive and misleading. It is certainly frivolous to contend that the testimony of the Commission's doctors was "inadmissible" (petitioners' brief, pp. 10, 12-16, 25-27), not only because it was plainly admissible as a matter of law, but because petitioners offered no objection to a single word of it (*supra* p. 9). The suggestion that the doctors were "unable to give an unbiased and uncolored opinion" (petitioners' brief, p. 12) and that their testimony was "founded on bias and prejudice" (*id.*, p. 15) is not only unwarranted by the record, but relates not at all to the admissibility of their testimony; it goes to their credibility, and it is for the Commission to determine the credibility of witnesses (*supra* p. 12).

²⁶ Petitioners offered the testimony of several witnesses who testified that petitioners' advertisements and container did not deceive them. In view of the applicable law (*supra*, pp. 11-17), it is unnecessary to discuss this testimony.

As to the Commission's lay witnesses, petitioners do not contend that their testimony was inadmissible; petitioners insinuate, instead, that the Commission unduly influenced and coached them, stating that the Commission's investigator laid "the groundwork for [their] testimony" by asking them "if those letters [M. D.] suggested that the product was endorsed by doctors or the medical profession" (petitioners' brief, pp. 17-18, 22). Petitioners' statement is untrue,²⁷ and their insinuation is without foundation in fact. The Commission's investigator did, of course, interview the witnesses in question, but his interviews were for the necessary and entirely legitimate purpose of determining the public's reaction to petitioners' advertising, and nothing in the record, and no fair inference flowing from any fact established by the record, warrants the suggestion that the Commission's investigator attempted to influence or coach the witnesses in any way whatever. Even if that had been done—and it certainly was not—the circumstance would only relate to the credibility of the witnesses and the weight of their testimony, matters for the Commission to determine (*supra*, p. 12), and it cannot be said that their testimony was not substantial, for the best efforts of petitioners' counsel on cross-examination served not to shake it in the slightest degree; indeed, the testimony elicited by his argumentative questions emphasized the deceptive character of petitioners' advertising.

²⁷ See R. 56, 62, 68, 91-92, 98-99.

There is no merit to petitioners' contention that its use of a cross is not deceptive or unlawful because "hundreds of other articles of merchandise are sold bearing * * * a cross similar to that used by the American Red Cross" (brief, p. 20) and the emblem is not "the sole property of that organization" (id., pp. 22-23). It is well settled that unlawful conduct on the part of others is no defense to a complaint charging a violation of the Federal Trade Commission Act,²⁸ and by the Act of Congress incorporating the American National Red Cross, that organization does have the exclusive right to the use of "any sign or insignia made or colored in imitation" of its emblem as against any person who did not use it prior to 1905.²⁹ Since petitioners' first use of a cross occurred

²⁸ *Federal Trade Commission v. Keppel & Brother*, 291 U. S. 304, 312-313 (1934); *Federal Trade Commission v. Winsted Hosiery Co.*, 258 U. S. 483, 493-494 (1922); *Hills Bros. v. Federal Trade Commission*, 9 F. 2d 481, 485 (C. C. A. 9th, 1926), cert. denied 270 U. S. 662 (1926); *Ford Motor Co. v. Federal Trade Commission*, 120 F. 2d 175, 182 (C. C. A. 6th, 1941), cert. denied 314 U. S. 668 (1941); *National Candy Co. v. Federal Trade Commission*, 104 F. 2d 999, 1004 (C. C. A. 7th, 1939), cert. denied 308 U. S. 610 (1939); *Minter v. Federal Trade Commission*, 102 F. 2d 69, 70-71 (C. C. A. 3rd, 1939); *Farmers' Livestock Commission Co. v. United States*, 54 F. 2d 375, 379 (E. D. Ill., 1931); *Butterick Company v. Federal Trade Commission*, 4 F. 2d 910, 912 (C. C. A. 2nd, 1925), cert. denied 267 U. S. 602 (1925).

²⁹ The statute provides, in part, "It shall be unlawful for any person, corporation, or association other than the American National Red Cross * * * for the purpose of trade or as an advertisement to induce the sale of any article whatsoever or for any business or charitable purpose to use * * * the emblem of the Greek red cross on a white ground, or any sign or insignia made or colored in imitation thereof or of the words 'Red Cross'.

long after that year, the Commission, under the declaration of policy set forth by Congress, could properly have barred its further use even had there been no evidence of deception.

Contrary to petitioners' contention, it is not at all "significant that the Commission offered not a single female witness to testify that she was * * * deceived" by petitioners' advertising (brief, p. 19), nor may this Court "take judicial notice that women are sole users * * * and * * * purchasers" of petitioners' product (*ibid.*) Petitioners' advertising, it is to be assumed, is intended to be and is read by both men and women, the record shows that men are frequent purchasers of preparations such as petitioners' (R. 81) and petitioners' product is specifically offered as a deodorant, gargle and mouth wash and for excessive perspiration, footbaths, cuts, sores and burns.³⁰ Petitioners' advertising was shown to be deceptive. It was entirely unnecessary to show that any purchasers had actually been deceived (*supra* pp. 16-17).

* * *. No person, corporation, or association that actually used * * * the said emblem, sign, insignia, or words for any lawful purpose prior to January 5, 1905, shall be deemed forbidden to continue the use thereof for the same purpose and for the same class of goods. If any person violates the provision of this section he shall be deemed guilty of a misdemeanor and, upon conviction in any Federal court, shall be liable to a fine of not less than one or more than five hundred dollars, or imprisonment for a term not exceeding one year, or both, for each and every offense." 33 Stat. 600, as amended by 36 Stat. 604; 36 U. S. C. A. § 4. See *Loonen v. Deutsch*, 189 F. 487, 488-489, 492 (S. D. N. Y., 1911).

³⁰ See Commission Exhibit 8 (not printed) listing "6 Uses and Directions for M. D. Medicated Douche Powder."

At pages 21-22 of their brief, petitioners say that the Commission forbids them to "use the letters 'MD' on any preparation not endorsed or recommended by the medical profession," and since the Commission knows "that the medical profession does not directly endorse or recommend any product," the "order, therefore, is based upon a condition impossible of fulfillment." This is a curious contention. And rather than suggesting that the order possesses some unspecified infirmity, it points up its complete validity, for petitioners certainly have no right to advertise that their preparation is endorsed by the medical profession if it is not so endorsed, and it is somewhat startling to find it argued that the impossibility of obtaining such an endorsement privileges petitioners falsely to proclaim that it exists. We daresay this Court would be loath to declare that so long as an advertiser cannot possibly make good on what he says, he has a perfect right to say it.

Petitioners' contention that the letters "M. D." were adopted merely as "a trade name meaning 'Medicated Douche'" (brief, p. 22), rather than for the purpose of indicating medical approval of their preparation, would not be important if true, for an intent to deceive need not be shown in proceedings under the Federal Trade Commission Act; misrepresentations made innocently and in good faith may be ordered discontinued (*supra*, p. 16). But petitioners did not adopt the letters "M. D." as a "trade name" for their preparation, the name of which consists of both letters and words, "M. D. Medicated Douche Powder." The

letters "M. D." have long signified to the public a member of the medical profession, and by usage have become so identified with that profession as to connote "Medical Doctor" and nothing else. As the court said of the "degree of M. D." in *Townsend v. Gray*, 62 Vt. 373, 19 A. 635, 636 (1890), it has "legal sanction and authority. But it has more. In practical affairs, it introduces its possessor to the confidence and patronage of the general public." A desire to gain that confidence and patronage, we submit, was precisely what prompted petitioners to advertise as they did, and Mr. Henry M. White, a Commission attorney (R. 270), testified that when he interviewed petitioner Bachman while investigating this case, the latter stated that:

the name M. D. * * * was suggested to him by an advertising man * * * and he wanted to convey the impression, without baldly stating the fact, that the product had been endorsed by the Medical Association.³¹

That petitioners' advertisements have a capacity to convey that impression to the public can hardly be doubted, and the Commission's finding to that effect is supported not only by the testimony to which we have referred, but by petitioners' advertisements themselves, silent witnesses which cannot be impeached. As the agency charged by Congress with the duty of protecting the public from misleading advertisements, the Commission, we suggest, because of its experience in dealing with the problem, may be assumed to be spe-

³¹ R. 275. Mr. Bachman denied that he said this (R. 160-161).

cially qualified to interpret the language and meaning of advertisements as read by the public,³² and we submit that its findings with respect to the deceptive character of petitioners' advertisements would have been warranted by the advertisements alone.³³ Supported both by them and by testimony as to actual public reaction, the findings cannot be successfully assailed.

IV

CONCLUSION

It is submitted that the Commission's findings as to the facts are supported by substantial evidence and

³² The Commission "was created with the avowed purpose of lodging the administrative functions committed to it in 'a body specially competent to deal with them by reason of information, experience and careful study of the business and economic conditions of the industry affected,' and it was organized in such a manner * * * as would 'give to [its members] an opportunity to acquire the expertness in dealing with these special questions concerning industry that comes from experience.'" *Federal Trade Commission v. Keppel & Brother*, 291 U. S. 304, 314 (1934). See also *Bates & Guild Co. v. Payne*, 194 U. S. 106, 108-109 (1904) ("where Congress has committed to the head of a department certain duties requiring the exercise of judgment and discretion, his action thereon, whether it involves questions of law or fact, will not be reviewed by the courts, unless he has exceeded his authority or this court should be of opinion that his action was clearly wrong"); *Schreiber v. United States*, 129 F. 2d 836, 839 (C. C. A. 7th, 1942); *Perkins v. Endicott Johnson Corp.*, 128 F. 2d 208, 220 (C. C. A. 2nd, 1942), *aff'd sub nom. Endicott Johnson Corp. v. Perkins*, 317 U. S. 501 (1943).

³³ See *Brougham v. Blanton Manufacturing Co.*, 249 U. S. 495, 499-500 (1919); *Houston v. St. Louis Independent Packing Co.*, 249 U. S. 479, 484 (1919); *Farley v. Simmons*, 99 F. 2d 343, 346 (App. D. C., 1938), *cert. denied* 305 U. S. 651 (1938), and cases cited *supra* note 14, p. 13.

that its order to cease and desist was properly entered. The Commission therefore prays that petitioners' petition to review be dismissed and that, pursuant to the statute,³⁴ the Court enter its decree affirming the Commission's order and commanding petitioners to obey the same and comply therewith.

Respectfully submitted.

W. T. KELLEY,

Chief Counsel,

JOSEPH J. SMITH, Jr.,

Assistant Chief Counsel,

JNO. W. CARTER, Jr.,

Special Attorney,

Attorneys for Federal Trade Commission.

WASHINGTON, D. C., AUGUST 1943.

³⁴ "To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission." Federal Trade Commission Act, § 5 (c), 52 Stat. 113; 15 U. S. C. A. § 45 (c).

APPENDIX

Pertinent provisions of the Federal Trade Commission Act (Act of September 26, 1914, 38 Stat. 717, 719-721, as amended by Act of March 21, 1938, 52 Stat. 111-114).

SEC. 5. (a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce. * * *

(c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the circuit court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith served upon the Commission, and thereupon the Commission forthwith shall certify and file in the court a transcript of the entire record in the proceeding, including all the evidence taken and the report and order of the Commission. Upon such filing of the

petition and transcript the court shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, evidence, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed, and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite. The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission. * * * [52 Stat. 111-113; 15 U. S. C. A. §45.]

SEC. 12. (a) It shall be unlawful for any person, partnership or corporation to disseminate, or cause to be disseminated, any false advertisement—

(1) By United States mails, or in commerce by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of food, drugs, devices, or cosmetics; or

(2) By any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in commerce of food, drugs, devices, or cosmetics.

(b) The dissemination or the causing to be disseminated of any false advertisement within the provisions of subsection (a) of this section shall be an unfair or deceptive act or practice in commerce within the meaning of section 5. [52 Stat. 114-115; 15 U. S. C. A. § 52.]

SEC. 15. For the purpose of sections 12, 13, and 14—

(a) The term “false advertisement” means an advertisement, other than labeling, which is misleading in a material respect; and in determining whether any advertisement is misleading, there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, sound, or any combination thereof, but also the extent to which the advertisement fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual. * * *

(c) The term “drug” means * * * articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; and * * * articles (other than food) intended to affect the structure or any function of the body of man or other animals * * *. [52 Stat. 116; 15 U. S. C. A. § 55.]

No. 10149

7

In the United States
Circuit Court of Appeals
For the Ninth Circuit

STANLEY LABORATORIES, INC., and
EDWARD A. BACHMAN, an individual
trading as STANLEY LABORATORIES and
as STILLMAN PRODUCTS COMPANY,

Petitioners.

vs.

FEDERAL TRADE COMMISSION,

Respondent.

Reply Brief of Petitioner

LEO LEVENSON,
Spalding Building
Portland, Oregon

JAMES J. HAYDEN,
1323 18th Street, N. W.
Washington, D. C.

Attorneys for Petitioners.

FILED

SEP - 8 1943

PAUL P. O'BRIEN,
CLERK



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STANLEY LABORATORIES, INC., and
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FEDERAL TRADE COMMISSION,

Respondent.

Reply Brief of Petitioner

The respondent in its brief, pages 12 and 13, state:

“... It applies also to the Commission’s findings as to the meaning of advertisements, for the meaning of advertisements to the public is itself a question of fact, and the Commission’s judgment as to their meaning and their false and deceptive character is conclusive unless palpably wrong.”

We contend that the Commission’s judgment in this case as to the meaning of, and alleged false and deceptive character of the letters M.D. is palpably wrong, unfair

and unjust. The same Commission in a proceeding entitled "*Docket 4657 In the Matter of Pacific Coast Paper Mills of Washington, Inc.*," dismissed a complaint charging deception in the use of the letters M.D. on a toilet tissue. In that proceeding the above named manufacturer widely distributes a toilet tissue under the trade name of M.D. The Commission issued a complaint, as above stated, contending that said Pacific Coast Paper Mills of Washington, Inc., was guilty of using unfair methods of competition and unfair or deceptive acts or practices by the use of the label M.D. After a hearing and the submission of briefs, the complaint was dismissed by the said Commission and the manufacturer is by the aforesaid action permitted to use said letters M.D. on its product. In the case at bar it is in evidence that petitioner herein applied to the United States Patent Office for the registration of the letters M.D. as a trade mark, (Respondent's exhibit No. 2, page 172 transcript) and it was duly registered April 4th, 1939, and petitioner has since enjoyed the use of it and made contracts with dealers under it and it has become known to the public by that label, trade name and mark. (And also for example, Exhibit No. 1, page 169 transcript.)

Certainly, if it is not deemed deceptive and false, as the Commission so held by dismissing the proceedings against the Pacific Coast Paper Mills of Washington, Inc., Docket 4657, it is palpably wrong, unfair and unjust to enjoin petitioner from the use of similar letters M.D. on its product. The issue is the same, but the conclusion of the Commission in the case at bar is different. The maxim *Stare decisis et non quieta movere* should apply. We are constrained to ask why it is not considered by the Commission to be false and deceptive to use the letters M.D. on the toilet tissue product, but is so considered on petitioner's product?

The reason this matter is submitted in a reply brief is due to the fact that the Commission dismissed the aforesaid proceedings of the Pacific Coast Paper Mills of Washington, Inc., subsequent to the filing of our petition for review and it was only recently called to our attention.

We therefore respectfully submit, that the cease to desist order of the Commission should be set aside to the extent that petitioner may continue to use the letters M.D. and the cross and nurse, in the sale of its product for all manufacturers should be entitled to the equal pro-

tection of the law as provided by Amendment XIV of the United States Constitution, and to equal privileges at its hands.

Respectfully submitted,

LEO LEVENSON, Esquire
Spalding Building
Portland, Oregon.

JAMES J. HAYDEN, Esquire
1323 18th Street, N.W.
Washington, D. C.

Attorneys for Petitioners.

United States
Circuit Court of Appeals
For the Ninth Circuit.

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

STIMSON MILL COMPANY, a corporation,
Respondent.

Transcript of the Record

Upon Petition to Review a Decision of the United
States Board of Tax Appeals

FILED

SEP 15 1942

PAUL P. O'BRIEN,
CLERK

No. 10202

United States
Circuit Court of Appeals
For the Ninth Circuit.

COMMISSIONER OF INTERNAL REVENUE,
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Respondent.

Transcript of the Record

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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APPEARANCES

For Taxpayer:

E. E. ADAMS, C.P.A.

For Comm'r.:

T. M. MATHER, Esq.,

Docket No. 104290

STIMSON MILL COMPANY,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET ENTRIES

1940

Aug. 19—Petition received and filed. Taxpayer notified. Fee paid.

Aug. 19—Request for hearing in Seattle, Washington filed by taxpayer. 8/20/40 copy served.

Aug. 20—Copy of petition served on General Counsel.

Sept. 25—Answer filed by General Counsel.

Sept. 30—Copy of answer served on taxpayer. Seattle, Washington.

1941

Jul. 22—Hearing set Sept. 8, 1941 in Seattle, Washington.

Sept. 8—Hearing had before Mr. Sternhagen on the merits. Stipulation of facts filed. Briefs due as per rules.

Sept. 27—Transcript of hearing of 9/8/41 filed.

Oct. 6—Brief filed by taxpayer.

Oct. 23—Brief filed by General Counsel. 10/24/41 copy served.

1942

Jan. 22—Opinion rendered, Sternhagen, Div. 10. Decision will be entered for the petitioner. 1/27/42 copy served.

Jan. 27—Decision entered, Sternhagen, Div. 10.

Feb. 18—Motion for review by the Board filed by General Counsel. 2/19/42 denied.

Apr. 18—Petition for review by U. S. Circuit Court of Appeals, 9th Circuit with assignments of error filed by General Counsel.

Apr. 27—Proof of service filed by General Counsel.
(2)

May 18—Certified copy of order from the 9th Circuit extending the time for preparation and transmission of the record filed.

Jul. 14—Statement of points filed by General Counsel with proof of service thereon.

Jul. 14—Agreed designation of contents of record filed. [1*]

*Page numbering appearing at top of page of original certified Transcript of Record.

United States Board of Tax Appeals

Docket No. 104290

STIMSON MILL COMPANY,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION

The above named taxpayer hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency dated June 28, 1940, symbols Seattle Division, IT:90D:JIK, and as a basis of its proceedings alleges as follows:

1. The petitioner is a corporation of the State of Washington, with its principal place of business at 2116 Vernon Place, Seattle, Washington. The return for the period here involved was filed with the Collector of Internal Revenue, Tacoma, Washington.

2. The notice of deficiency (a copy of which is attached and marked "Exhibit A") was mailed to the petitioner on or about June 28, 1940.

3. The taxes in controversy are income taxes for the taxable year ended December 31, 1938 in the total amount of the deficiency asserted by the respondent, viz., \$380.00.

4. The determination of the tax set forth in the said notice of deficiency is based upon the following error: [2]

(a) Respondent has erroneously disallowed a capital loss of \$2,000.00 realized in the liquidation of Second Holding Corporation; or

(b) In the alternative, respondent has refused to allow a capital loss of \$2,000.00, resulting from the stock of Second Holding Corporation becoming worthless during the taxable year.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

STATEMENT OF FACTS

1. On May 10, 1930 the petitioner caused to be organized under the laws of the State of Washington, a corporation designated as Second Holding Corporation, hereinafter for convenience called "Second".

2. On that date the petitioner owned certain lands lying in Township 32 North, Ranges 5 and 6 East of the Willamette Meridian.

3. The said lands had been acquired by the petitioner prior to March 1, 1913 and had been held by it in fee simple thereafter until transferred to the said Second.

4. The Timber Section of the Bureau of Internal Revenue determined that the lands lying in Range 5 East, W. M. had a fair market value at March 1, 1913 of \$12.50 per acre and that the land in Range 6 East, W. M. had a fair market value of \$2.50 per acre.

5. On May 14, 1930 the petitioner transferred to

the said Second 1575.59 acres of land situate in Township 32 N., Range 5 E., W. M. and 1,401.8 acres situate in Township 32 N., Range 6 E., W. M. in exchange for the entire issue of Second's capital stock.

6. Petitioner was sole stockholder of Second throughout the latter's existence.

7. The fair market value of the said lands as of March 1, 1913 was \$23,199.37.

8. The cost to petitioner of said lands was not less than \$9,000.00. [3]

9. The sole purpose for which Second was incorporated was to hold title to the said lands, to sell them in such parcels and on such terms as might seem desirable, to collect the proceeds of such sales and turn them over to the petitioner.

10. It was never contemplated by the petitioner or its officers or trustees, or by the representatives of petitioner who acted as officers and trustees of Second, that Second should engage in any activity other than as hereinbefore outlined, and Second never engaged in any activity not so contemplated.

11. Second sold land from time to time and transferred the avails therefrom to the petitioner in the following amounts:

1931.....	\$1,038.50
1932.....	1,185.00
1937.....	279.99
1938.....	2,158.65
	<hr/>
	\$4,662.14
	<hr/>

12. None of the above distributions were formally authorized by the trustees of Second, and its minute book shows no resolution at any time to liquidate or to distribute.

13. The proceeds from the last sale of land were transferred to petitioner in June 1938.

14. On December 22, 1938 the trustees of Second met and resolved that, inasmuch as the purpose of Second had been fulfilled by the several sales, collections and liquidating distributions, and there was nothing left but the bare shell of corporate organization, the corporation should be dissolved.

15. No steps were taken to dissolve Second but it was forthwith abandoned.

16. The income of Second was included with that of the petitioner in consolidated income tax returns filed for the years 1930 to 1932, inclusive. The petitioner derived no tax advantage from the losses of Second except in 1932 when petitioner's taxable income was thus reduced thereby in the amount of \$1,565.00, as follows:

TAXABLE INCOME

	Petitioner	Subsidiary
1930.....	\$53,685.38*	\$12,257.60*
1931.....	4,237.87*	267.65
1932.....	4,137.86	1,565.00*
	<u> </u>	<u> </u>

*Indicates net losses in red.

Wherefore, petitioner prays that this Board may hear the proceedings and determine

(a) That petitioner suffered a capital loss of \$2,000.00 through complete liquidation of Second Holding Corporation, the first distribution therein being made in the year 1931 and the last of the series of distributions being made in the year 1938; or

(b) In the alternative, that Second Holding Corporation made no distributions in complete liquidation within the scope of Sections 112(b)(6) and 115 (c) of the Revenue Act of 1938;

(c) That the correct tax liability of the petitioner for the year 1938 was \$6,325.57, as originally assessed and paid to the Collector of Internal Revenue, and

(d) That the Board give this petitioner such other and further relief as is just and equitable in the premises.

E. E. ADAMS

Certified Public Accountant

Counsel for Petitioner

1146 Henry Building,
Seattle, Washington [5]

(Duly verified) [6]

EXHIBIT A

Treasury Department
Internal Revenue Service
Seattle, Washington
June 28, 1940

Seattle Division
350 Federal Office Building
IT:90D:JIK

Stimson Mill Company,
2116 Vernon Place,
Seattle, Washington.

Sirs:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1938, discloses a deficiency of \$380.00 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to Internal Revenue Agent in Charge, Seattle, Washington, for the attention of IT:90D:JIK. The signing and filing of this form will expedite the

closing of your return by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,

Commissioner,

By GEORGE C. EARLEY,

Internal Revenue Agent in Charge

Enclosures:

Statement.

Form of waiver.

JK:RMT [7]

STATEMENT

IT:90D:JK

Stimson Mill Company

1116 Vernon Place

Seattle, Washington

Tax Liability for the Taxable Year Ended

December 31, 1938

Income Tax

Liability—\$6,705.57

Assessed—\$6,325.57

Deficiency—\$380.00

In making this determination of your income tax liability, careful consideration has been given to the report of examination dated January 12, 1940;

to your protest dated March 23, 1940; and to the statements made at the conferences held on April 17, 1940, May 17, 1940 and May 24, 1940.

A copy of this letter and statement has been mailed to your representative E. E. Adams, 1146 Henry Building, Seattle, Washington, in accordance with the authority contained in the power of attorney executed by you and on file with the Bureau.

ADJUSTMENT TO NET INCOME

Net income as disclosed by return.....	\$36,156.75
Unallowable deduction and additional income	
(a) Capital loss	2,000.00
	<hr/>
Net income adjusted.....	\$38,156.75

EXPLANATION OF ADJUSTMENT

(a) The loss claimed in your return of \$2,000.00 upon the liquidation of Second Holding Corporation is disallowed for the reason that the transaction in which the loss is claimed to have occurred represented the receipt of property upon complete liquidation of another corporation in connection with which no loss may be recognized under section 112(b)(6) of the Revenue Act of 1938. In addition, the basis of loss of the stock in question has not been proven. [8]

COMPUTATION OF TAX

Excess-Profits Tax

Taxable Net income.....	\$ 38,156.75
Less: Dividends received credit	
(85% of \$30.00).....	25.50
10% of \$1,000,000.00, value of	
capital stock as declared in	
your capital stock tax return	
for year dated June 30, 1938..	100,000.00
	100,025.00

Net income subject to excess-profit tax.....	None
Excess-profits tax	None

Income Tax

Taxable net income.....	38,156.75
Less: Excess-profits tax.....	None

Net income for income tax computation.....	\$ 38,156.75
Tentative Tax:	7,249.78

19% of \$38,156.75

14.025% of dividends received—

\$30.00\$ 4.21

2.5% of dividends paid credit—

\$21,600.00 540.00 544.21

Total income tax.....	6,705.57
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Income tax assessed

Original, Account No. 401128..... 6,325.57

Deficiency of income tax.....	\$ 380.00
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[Endorsed]: U. S. B. T. A. Filed Aug. 19, 1940.

[9]

[Title of Board and Cause.]

ANSWER

Comes Now the Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed herein, admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the petition.

2. Admits the allegations contained in paragraph 2 of the petition.

3. Admits that the taxes in question are income taxes for the taxable year ended December 31, 1938, but denies that the amount in controversy is as alleged in paragraph 3 of the petition.

4. (a) and (b). Denies that the Commissioner erred as alleged in subparagraphs (a) and (b) of paragraph 4 of the petition.

5. 1 to 16, inclusive. For lack of information and knowledge sufficient to form a belief, denies the allegations contained in [10] subparagraphs 1 to 16, inclusive, of paragraph 5 of the petition.

6. Denies generally and specifically each and every material allegation contained in the petition herein, not hereinbefore specifically admitted, qualified, or denied.

Wherefore, it is prayed that the petitioner's appeal be denied and that the Commissioner's determination of deficiency be approved.

(Signed) J. P. WENCHEL,

BHN

Chief Counsel, Bureau
of Internal Revenue.

Of Counsel:

ALVA C. BAIRD,

Division Counsel,

B. H. NEBLETT,

Special Attorney,

Bureau of Internal Revenue.

BHN/vg 9-19-40

[Endorsed]: U. S. B. T. A. Filed Sept. 25, 1940.

[11]

[Title of Board and Cause.]

STIPULATION

It is hereby stipulated and agreed, by and between the above named parties, by their respective counsel, that:

1. Second Holding Corporation was organized in 1930 and petitioner acquired all of the capital stock of the said Second Holding Corporation in exchange for 1,575.59 acres of logged-off land lying in Township 32 North, Range 5 East W. M., and 1,401.8 acres of logged-off land lying in Township 32 North, Range 6 East W. M.

2. The said lands were acquired by petitioner while covered with a stand of timber and there was no segregation of cost between the land and the timber.

3. A fair allocation of cost to the said lands would be not less than \$9,000.00.

4. The income of Second Holding Corporation

was reported on returns separate from those of the petitioner except for the years 1930, 1931 and 1932, for which years consolidated returns were filed.

5. In 1930 both petitioner and Second Holding Corporation had net losses.

6. In 1931 petitioner had a net loss and Second Holding Corporation had net income of \$267.65.

7. In 1932 petitioner benefitted by a deduction of \$1,565.00 net loss of Second Holding Corporation.

8. Petitioner was the sole stockholder of Second Holding Corporation throughout its entire existence, except for qualifying shares the beneficial interest of which was in petitioner.

9. Second Holding Corporation was organized for the sole purpose of liquidating the land described in paragraph (1) of this [12] stipulation and transferring the proceeds to petitioner as soon as converted into cash.

10. Second Holding Corporation sold land from time to time and transferred the avails therefrom to the petitioner in the following amounts:

1931	\$1,038.50
1932	1,185.00
1937	279.99
1938	2,158.65
	<hr/>
	\$4,662.14
	<hr/> <hr/>

11. The proceeds from the last sale of land were transferred to petitioner in June 1938.

12. The minute book of Second Holding Corporation contains a record of a meeting of that

company's trustees on December 22, 1938, of which the attached Exhibit A is a copy.

13. The minute book of Second Holding Corporation contains no record of any meeting wherein either liquidation or dissolution was discussed or wherein any distributions of any kind were authorized.

14. No steps were taken to dissolve Second Holding Corporation but it was abandoned forthwith, immediately after the meeting, the minutes of which is attached as Exhibit A.

E. E. ADAMS,

E. E. Adams

Certified Public Account-
ant, for the Petitioner.

J. P. WENCHEL

For the Respondent. [13]

EXHIBIT "A"

SECOND HOLDING CORPORATION MINUTES OF MEETING OF TRUSTEES

A special meeting of the trustees of Second Holding Corporation was held at 1:30 P. M., December 22, 1938.

John A. Baillargeon and E. C. Stone were present, being all of the trustees of the Company. Mr. Baillargeon acted as Chairman and Mr. Stone as Secretary.

Mr. Baillargeon stated that the plan of liquidation of the company and its assets, which had been instituted in 1931, had been completed, and that

the Company had no further assets. He reported that liquidating dividends had been paid to Stimson Mill Company, as stockholder, as follows: 1931—\$1038.50; 1932—\$1185.00; 1937—\$279.99; 1938—\$2158.65.

The following resolution was then passed:—

Resolved that the liquidation of the Second Holding Corporation and its assets begun in the year 1931 has now been completed and the payment of liquidating dividends as made to Stimson Mill Company for the years 1931, 1932, 1937 and 1938, are approved. That the signature of Stimson Mill Company on the Minutes of this meeting shows its approval of this Resolution and its acknowledgment that the plan of liquidation has been completely carried out.

Mr. Baillargeon then stated that there was nothing further to do except the disincorporation of the Company, and it was decided to turn this matter over to an attorney so that all of the legal requirements of dissolution could be complied with. [14]

There being no further business, the meeting adjourned.

(Signed) JOHN A. BAILLARGEON
Chairman

(Signed) E. C. STONE
Secretary

STIMSON MILL COMPANY

By (Signed) JOHN A. BAILLARGEON
President

[Endorsed]: U. S. B. T. A. Filed Sept. 8, 1941.

[15]

[Title of Board and Cause.]

TRANSCRIPT OF PROCEEDINGS

Federal Office Building,
Seattle, Washington,
September 8, 1941.
Ten o'clock a. m.

Met pursuant to notice.

Before: Hon. John M. Sternhagen.

APPEARANCES:

E. E. ADAMS, Esq., C. P. A., with C. S. Cowan &
Co., Henry Building, Seattle, Washington, ap-
pearing for the petitioner.

E. M. MATHER, Esq., 1215 Smith Tower, Seattle,
Washington, appearing for respondent. [16]

PROCEEDINGS

The Court: Docket 104290, Stimson Mill Com-
pany.

Who appears for the petitioner?

Mr. Adams: E. E. Adams, C. P. A., appearing
for the petitioner.

Mr. Mather: E. M. Mather, appearing for the
respondent.

The Court: All right, sir.

Mr. Adams: Your Honor, we have a written
stipulation of facts that we wish to present.

The Court: Will you please tell me what the
case is about?

STATEMENT OF CASE ON BEHALF
OF PETITIONER

Mr. Adams: This case deals entirely with the question of whether a capital loss is allowable to the extent of \$2,000, resulting either from a liquidation of the subsidiary, or, in the alternative, a worthless stock loss, and the petitioner claims such a loss which was disallowed by the respondent upon the ground that Provision 112(b)6 of the Revenue Act of 1938, the applicable statute barred recognition of the loss.

The petitioner's position is that the provisions of that section, which deal with the time limit in which the liquidations occur under the plan of liquidation is a bar to the application of the statute, and, in the alternative, that there was no plan of liquidation adopted, and the distributions made were distributions out of capital, and that some six months after the last distribution was made and when there was nothing in the corporation but Shell, that the stock was worthless and it was charged off at that time. [18]

The Court: Is your case entirely in a stipulation of facts?

Mr. Adams: In a written stipulation of facts which we desire to amend at the suggestion of counsel for the respondent, by adding one sentence thereto.

Mr. Mather: That, substantially, is the issue in the case, if your Honor please. It involves \$380 deficiency for the year 1938; which is all covered

by a stipulation of facts, upon which that issue can be decided.

The Court: All right; you may hand in your stipulation.

Mr. Adams: The amendment which is to be added to the stipulation is on point 14, the last point, to change the final period to a comma and add, "immediately after the meeting, the minute of which is attached to Exhibit A."

Mr. Mather: That is agreeable, your Honor.

The Court: Those are quoted words, are they, "the minute of which is attached to Exhibit A"?

Mr. Adams: Yes, sir. And with that, the petitioner rests, your Honor.

The Court: Is there anything for the respondent?

Mr. Mather: That is all, your Honor.

The Court: You want to file your briefs, I suppose?

Mr. Adams: I suppose briefs on the law.

The Court: You suppose what?

Mr. Adams: I suppose that we file a brief on the law.

The Court: If you want to file briefs, you can file them in accordance with the rule.

Mr. Adams: Yes, sir.

(Hearing concluded.)

[Endorsed]: U. S. B. T. A. Filed Sept. 27, 1941.

[19]

[Title of Board and Cause.]

OPINION

Docket No. 104290. Promulgated January 22, 1942.

A receipt by a corporation entirely of money in complete liquidation of another corporation of which it owns all the shares, held, not within section 112(b)(6), Revenue Act of 1938, and the loss may be recognized.

E. E. Adams, C. P. A., for the petitioner.

T. M. Mather, Esq., for the respondent.

Sternhagen:

In determining a deficiency of \$380 in petitioner's income tax for 1938, the Commissioner disallowed a loss of \$2,000, saying:

The loss claimed in your return of \$2,000 upon the liquidation of Second Holding Corporation is disallowed for the reason that the transaction in which the loss is claimed to have occurred represented the receipt of property upon complete liquidation of another corporation in connection with which no loss may be recognized under section 112(b)(6) of the Revenue Act of 1938. In addition, the basis of loss of the stock in question has not been proven.

The facts are found as stipulated. The return was filed in Tacoma, Washington.

The petitioner owned all the shares of the Second Holding Corporation from the time of its organization in 1930, having received them in ex-

change for two tracts of land from which petitioner had removed the timber. The cost to petitioner of the land, and hence its basis for the shares, was \$9,000. Second Holding Corporation was organized for the sole purpose of liquidating the land and transferring the proceeds to petitioner as soon as converted into cash. Such proceeds were transferred to petitioner, as follows:

1931	\$1,038.50
1932	1,185.00
1937	279.99
1938	2,158.65
<hr/>	
Total.....	4,662.14

[20]

The Second Holding Corporation was then abandoned, after the trustees had resolved that the liquidation begun in 1931 was completed and that the payment of the foregoing liquidating dividends was approved.

The \$2,158.65 received by the petitioner in 1938 was the last item of liquidation of the Second Holding Corporation. By section 115(c) of the Revenue Act of 1938 it "shall be treated as in part or full payment in exchange for the stock. The gain or loss to the distributee resulting from such exchange shall be determined under section 111, but shall be recognized only to the extent provided in section 112." By section 111, "the loss shall be the excess of the adjusted basis provided" in section

113(b) "for determining loss over the amount realized." The amount realized is, by section 111(b), "the sum of any money received." The extent of the gain is, by section 111(c), determinable under section 112.

Section 112 covers the entire subject of recognition of gain or loss, and provides as the general rule that upon sale or exchange of property the entire amount of gain or loss shall be recognized, and provides specific exceptions. Subdivision (b) describes eight exceptions of "exchanges solely in kind", and subdivisions (c), (d), and (e) describe exceptions of "exchanges not solely in kind." The Commissioner's determination that no loss of petitioner may be recognized is founded upon section 112(b)(6), dealing with "Property Received by a Corporation on Complete Liquidation of Another", which provides, "No gain or loss shall be recognized upon the receipt by a corporation of property distributed in complete liquidation of another corporation." The petitioner contends that section 112(b)(6) is inapplicable because its receipt of only money may not be regarded as a receipt of property.

The petitioner's position is correct. The entire Supplement B, sections 111 to 121, covering the subject of computation of net income, contains repeated references to property and to money in separate classes and there is a clear manifestation of legislative intent to prevent the confusion of one with the other. A taxpayer corporation which bought a property for \$x organized a new corpo-

ration, to which it transferred the property in exchange for all the shares, had the new corporation sell the property for \$3x, and transferred the \$3x to the taxpayer in complete liquidation, would surely not have been permitted to avoid tax on the \$2x gain in reliance upon section 112(b)(6). The no-gain-or-loss provision was intended to cover situations in which the corporate taxpayer received property and not money, so that realization would not occur until the property was converted into cash. In a liquidation of property requiring a further step by the distributee to bring about realization of money, no gain [21] or loss was to be recognized as the subject of tax or deduction until the conversion into money. How else and when would such a clear gain as appears in the foregoing illustration be taxed? We can not agree, therefore, with the conclusion of G. C. M. 19,435, 17 C. B. (1), p. 176.

The holding of *Halliburton v. Commissioner*, 78 Fed. (2d) 265, construing the word property in section 203(b)(4), Revenue Act of 1924 (section 112(b)(5), Revenue Act of 1938), as including money, may not be extended beyond its own rationale into any of the other subdivisions of section 112. The reasoning of the court was to promote the intendment of subdivision (b)(5), and the language of the opinion was clearly limited within that scope. It may not be adopted as a pronouncement that elsewhere in the statute the meaning of the word property must be read as includ-

ing money. No decisions have applied the doctrine to any other provisions of the statute. See *Portland Oil Co. v. Commissioner*, 109 Fed. (2d) 479, 488; *George P. Skouras*, 45 B. T. A. — (Dec. 17, 1941).

The Commissioner was in error in disallowing any deduction for petitioner's loss. The deduction should have been allowed within the capital loss limitation, and the determination is reversed.

Decision will be entered for the petitioner. [22]

United States Board of Tax Appeals
Washington

Docket No. 104290

STIMSON MILL COMPANY,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

In accordance with the Board's report, promulgated January 22, 1942, it is

Ordered and Decided That there is no deficiency in income tax for 1938.

Enter:

Entered Jan. 27, 1942.

[Seal] (S) J. M. STERNHAGEN,

Member. [23]

In the United States Circuit Court of Appeals
for the Ninth Circuit

B. T. A. Docket No. 104290

GUY T. HELVERING, Commissioner of Internal
Revenue,

Petitioner on Review.

v.

STIMSON MILL COMPANY,

Respondent on Review.

PETITION FOR REVIEW

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Now Comes Guy T. Helvering, Commissioner of Internal Revenue, by his attorneys, Samuel O. Clark, Jr., Assistant Attorney General, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and John W. Smith, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

I.

Jurisdiction

That the petitioner on review, hereinafter referred to as the Commissioner, is the duly appointed, qualified, and Acting Commissioner of Internal Revenue, holding his office by virtue of the laws of the United States; that the respondent on review, Stimson Mill Company, hereinafter referred to as the taxpayer, is a corporation organ-

ized in 1890 under the laws of the State of Washington, with its principal place of business at Seattle, Washington.

That the taxpayer executed and filed a Federal corporation income and excess-profits tax return (Form 1120) for the year 1938 with the [24] Collector of Internal Revenue for the District of Washington, Tacoma, Washington, whose office is within the jurisdiction of this Honorable Court; that the Court in which the review of this cause is sought is the United States Circuit Court of Appeals for the Ninth Circuit.

That the Commissioner files this petition for review pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code.

II.

Nature of Controversy.

The nature of the controversy is as follows, to-wit:

Taxpayer owned all the shares of the Second Holding Corporation from the time of its organization in 1930, having received them in exchange for two tracts of land from which taxpayer had removed the timber. The Second Holding Corporation was organized for the sole purpose of liquidating the land and transferring the proceeds to taxpayer as soon as converted into cash. Certain amounts were transferred to taxpayer in 1931, 1932, and 1937. In 1938 the taxpayer received \$2,158.65 in money in complete liquidation of the Second Holding Corporation.

Taxpayer in its 1938 tax return claimed a capital loss of \$2,000 against the loss of \$18,514.43 alleged to have been sustained on the capital stock of the Second Holding Corporation. In auditing the return the Commissioner denied the deduction of the alleged capital loss for the year 1938, and on June 28, 1940, proposed a deficiency in income tax for said year in the amount of \$380.00 on two grounds: (1) That the transaction in which the loss was claimed to have occurred represented [25] the receipt of property upon complete liquidation of the Second Holding Corporation in connection with which no loss may be recognized under Section 112(b)(6) of the Revenue Act of 1938, 52 Stat. 447, and (2) the basis of the loss of the stock in question had not been proven.

On August 19, 1940, taxpayer filed a petition with the United States Board of Tax Appeals, appealing from the deficiency set forth in the notice of deficiency dated June 28, 1940, alleging that the Commissioner had erred in disallowing the capital loss of \$2,000 realized in the liquidation of the Second Holding Corporation, or, in the alternative, Commissioner had refused to allow a capital loss of \$2,000 resulting from the stock of Second Holding Corporation becoming worthless during 1938. On September 25, 1940, the Commissioner filed his answer to said petition. The proceedings came on for hearing before a Division of the Board of Tax Appeals at Seattle, Washington, September 8, 1941.

On January 22, 1942, the Board promulgated its

opinion (46 B. T. A.—No. 19) wherein it held that the loss may be recognized on the ground that Section 112(b)(6), *supra*, is inapplicable because taxpayer's receipt of only money may not be regarded as a receipt of property. On January 27, 1942, the Board entered its decision wherein and whereby it ordered and decided that there is no deficiency in income tax for the calendar year 1938. [26]

* * * * *

Wherefore, the Commissioner petitions that the decision of the Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for Ninth Circuit, that a transcript of record be prepared in accordance with the rules of said Court and transmitted to the Clerk of said Court for filing, and that proper action be taken to the end that the errors complained of may be reviewed by said Court.

(Sgd.) SAMUEL O. CLARK, JR.

Assistant Attorney General

(Signed) J. P. WENCHEL

R.L.W.

Chief, Counsel, Bureau of
Internal Revenue, Coun-
sel for Petitioner on
Review.

Of Counsel:

JOHN W. SMITH,

Special Attorney,

Bureau of Internal Revenue.

JWS:br 4-17-42

[Endorsed]: U. S. B. T. A. Filed Apr. 18, 1942.

[28]

[Title of Circuit Court of Appeals and Cause.]

NOTICE OF FILING PETITION
FOR REVIEW

To Stimson Mill Company, 2116 Vernon Place,
Seattle, Washington.

You are hereby notified that the Commissioner of Internal Revenue did, on the 18th day of April, 1942, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit, of the decision of the Board heretofore rendered in the above-entitled cause. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 18th day of April, 1942.

(Signed) J. P. WENCHEL

RLW

Chief Counsel, Bureau of
Internal Revenue, Coun-
sel for Petitioner on
Review.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 21st day of April, 1942.

STIMSON MILL COMPANY

By JOHN A. BAILLARGEON

[Endorsed]: U. S. B. T. A. Filed Apr. 27, 1942.

[29]

[Title of Circuit Court of Appeals and Cause—
B. T. A. Docket No. 104290.]

NOTICE OF FILING PETITION
FOR REVIEW

To E. E. Adams, 1146 Henry Building, Seattle,
Washington.

You are hereby notified that the Commissioner of Internal Revenue did, on the 18th day of April, 1942, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit, of the decision of the Board heretofore rendered in the above-entitled cause. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 18th day of April, 1942.

(Signed) J. P. WENCHEL

RLW

Chief Counsel, Bureau of
Internal Revenue, Coun-
sel for Petitioner on
Review.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 20 day of April, 1942.

(S) E. E. ADAMS

Counsel for Respondent on Review

[Endorsed]: U. S. B. T. A. Filed Apr. 27, 1942.

[Title of Circuit Court of Appeals and Cause.]

STATEMENT OF POINTS

Now Comes Guy T. Helvering, Commissioner of Internal Revenue, the petitioner on review herein, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and hereby asserts the following errors on which he intends to rely in this review:

1. The Board erred in holding and deciding that the term "property" as used in Section 112(b)(6) of the Revenue Act of 1938, 52 Stat. 447 does not include money and the loss realized on the complete liquidation by taxpayer of its sole-owned corporation may be recognized.

2. The Board erred in holding and deciding that Section 112(b)(6) of the Revenue Act of 1938, 52 Stat. 447, is inapplicable because taxpayer's receipt of only money may not be regarded as a "receipt of property."

3. The Board erred in failing to hold and decide that the term "property" as used in Section 112(b)(6) of the Revenue Act of 1938, 52 Stat. 447, includes money received in complete liquidation of another corporation.

4. The Board erred in entering its decision wherein it ordered and decided that there is no deficiency in income tax for the calendar year 1938.

5. The Board erred in failing and refusing to enter a decision [31] redetermining a deficiency of \$380.00 for the calendar year 1938.

6. The Board erred in that its decision is not supported by the evidence.

7. The Board erred in that its decision is contrary to law and regulation.

(Signed) J. P. WENCHEL

RLW

Chief Counsel, Bureau of
Internal Revenue, Coun-
sel for Petitioner on
Review.

Service of a copy of the within statement of points is hereby admitted this 10 day of July, 1942.

P. W. MAXWELL,

Counsel for Respondent on Review
804 White Bldg., Seattle,
Wash.

JWS:br 7-7-42

[Endorsed]: U. S. B. T. A. Filed Jul. 14, 1942.

[32]

[Title of Circuit Court of Appeals and Cause—
B. T. A. Docket No. 104290.]

DESIGNATION OF PORTIONS OF RECORD,
PROCEEDINGS AND EVIDENCE TO BE
CONTAINED IN THE RECORD ON RE-
VIEW

To the Clerk of the United States Board of Tax
Appeals:

You will please prepare, transmit and deliver to
the Clerk of the United States Circuit Court of

Appeals for the Ninth Circuit copies duly certified as correct of the following documents and records in the above-entitled proceeding in connection with the petition for review by the Circuit Court of Appeals for the Ninth Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of all proceedings before the Board.
2. Pleadings before the Board:
 - (a) Petition including copy of deficiency letter.
 - (b) Answer.
3. Stipulation of facts, filed September 8, 1941, with Exhibit A attached.
- 3a. Official Report of Proceedings before Board, September 8, 1941.
4. Opinion and Decision.
5. Petition for review, together with proof of service of notice of filing and of service of a copy of petition for review. [33]
6. Statement of Points to be relied upon by the Commissioner.
7. Court order enlarging time for the preparation, transmission and delivery of the certified typewritten transcript of the record on review. [Not included in record.]
8. This designation of portions of the record, proceedings, and evidence to be contained in the record on review.

Said transcript is to be prepared, certified, and transmitted as required by law and the rules of the United States Circuit Court of Appeals for the Ninth Circuit.

(Signed) J. P. WENCHEL

RLW

Chief Counsel, Bureau of
Internal Revenue, Coun-
sel for Petitioner on
Review.

Service of a copy of the within designation is hereby admitted this 10 day of July, 1942. Agreed to:

(Sgd.) P. W. MAXWELL

Counsel for Respondent on Review

JWS:br 7-7-42

[Endorsed]: U. S. B. T. A. Filed Jul. 14, 1942.

[34]

In the United States Circuit Court of Appeals
for the Ninth Circuit

C. C. A. No. 10202

B. T. A. Docket No. 104290

GUY T. HELVERING, Commissioner of Internal
Revenue,

Petitioner on Review,

v.

STIMSON MILL COMPANY,

Respondent on Review.

ORDER EXTENDING TIME

Upon consideration of the motion filed herein by petitioner on review, and good cause appearing to the Court for the granting of such motion, it is by the Court ordered:

That the motion is granted as made and that the time for the preparation and transmission to the Clerk of this Court of the record sur petition for review filed in the above-entitled proceeding be and it is hereby extended to and including July 27, 1942.

It Is Further Ordered that the Clerk of this Court be directed to transmit to the Clerk of the Board of Tax Appeals a certified copy of this order to be by him incorporated in the record on review as certified and transmitted by him to this Court.

By the Court,

FRANCIS A. GARRECHT,
Judge, U. S. Circuit Court of Appeals.

Dated this 14 day of May, 1942.

[Endorsed]: Filed May 14, 1942.

A True Copy.

Attest: May 14, 1942.

[Seal] (s) PAUL P. O'BRIEN,
Clerk.

Now, July 20, 1942, the foregoing order certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[Endorsed]: U. S. B. T. A. Filed May 18, 1942.

[Title of Board and Cause—Docket No. 104290.]

CERTIFICATE TO TRANSCRIPT
OF RECORD

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 34, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praeipie in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 20th day of July, 1942.

[Seal] B. D. GAMBLE,
Clerk, United States Board of Tax Appeals

[Endorsed]: No. 10202. United States Circuit Court of Appeals for the Ninth Circuit. Commissioner of Internal Revenue, Petitioner, vs. Stimson Mill Company, a corporation, Respondent. Transcript of the Record upon Petition to Review a Decision of the United States Board of Tax Appeals.

Filed July 24, 1942.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

No. 10202

In the United States Circuit Court of Appeals
for the Ninth Circuit

B. T. A. Docket No. 104290

GUY T. HELVERING, Commissioner of Internal
Revenue,

Petitioner on Review,

v.

STIMSON MILL COMPANY,

Respondent on Review.

PETITIONER'S DESIGNATION OF THE
PARTS OF THE RECORD TO BE PRINTED

To the Clerk of the United States Circuit Court of
Appeals for the Ninth Circuit:

Guy T. Helvering, Commissioner of Internal
Revenue, the petitioner on review herein, by his
attorneys, Samuel O. Clark, Jr., Assistant Attorney

General, and J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, pursuant to his petition for review of the decision of the United States Board of Tax Appeals entered January 27, 1942, designates the parts of the record considered material to the questions on review to be included in the printed transcript of the record, as follows:

1. Docket entries of all proceedings before the Board.
2. Pleadings before the Board:
 - (a) Petition including copy of deficiency letter.
 - (b) Answer.
3. Stipulation of Facts filed September 8, 1941, with Exhibit A. attached.
- 3a. Official Report of Proceedings before Board, September 8, 1941.
4. Opinion and Decision.
5. Petition for review, together with proof of service of notice of filing and of service of a copy of petition for review.
6. Statement of Points to be relied upon by the Commissioner.
7. Court order enlarging time for the preparation, transmission and delivery of the certified typewritten transcript of the record on review.

8. This designation of portions of the record, proceedings, and evidence to be contained in the printed record on review.

SAMUEL O. CLARK, JR.

Assistant Attorney General

J. P. WENCHEL

Chief Counsel, Bureau of Internal Revenue, Counsel for
Petitioner on Review.

Service of a copy of the designation of the parts of the record to be printed is hereby admitted this 10 day of July, 1942. Agreed to.

P. W. MAXWELL,

Counsel for Respondent on Review
804 White Building,
Seattle, Washington

No. 10202

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

STIMSON MILL COMPANY, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE UNITED
STATES BOARD OF TAX APPEALS

BRIEF FOR THE PETITIONER

SAMUEL O. CLARK, Jr.,

Assistant Attorney General.

SEWALL KEY,

ARTHUR A. ARMSTRONG,

Special Assistants to the Attorney General.

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In the United States Circuit Court of Appeals for the Ninth Circuit

No. 10202

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

STIMSON MILL COMPANY, RESPONDENT

*ON PETITION FOR REVIEW OF THE DECISION OF THE UNITED
STATES BOARD OF TAX APPEALS*

BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the Board of Tax Appeals (R. 20-24) is reported at 46 B. T. A. 141.

JURISDICTION

On June 28, 1940, the Commissioner mailed to the taxpayer a notice of a deficiency of \$380 in its income tax for the year 1938. (R. 8.) On August 19, 1940, taxpayer filed a petition with the Board of Tax Appeals for a redetermination of the deficiency pursuant to Section 272 of the Internal Revenue Code. R. 1, 3-7.) On January 27, 1942, the Board entered its decision, finding no deficiency in income tax for the year 1938. (R. 24.) The case is brought to this Court by the Commissioner's petition for review filed April 18, 1942 (R. 25-28) pursuant to Sections 1141 and 1142 of the Internal Revenue Code.

QUESTION PRESENTED

Section 112 (b) (6) of the Revenue Act of 1938 provides that in certain specified circumstances no gain or loss shall be recognized upon the receipt by a parent corporation of "property" distributed in complete liquidation of a subsidiary corporation. Does the word "property" include money?

STATUTE INVOLVED

Revenue Act of 1938, c. 289, 52 Stat. 447:

SEC. 112. RECOGNITION OF GAIN OR LOSS.

* * * * *

(b) *Exchanges Solely in Kind.*—

* * * * *

(6) *Property received by corporation on complete liquidation of another.*—No gain or loss shall be recognized upon the receipt by a corporation of property distributed in complete liquidation of another corporation. For the purposes of this paragraph a distribution shall be considered to be in complete liquidation only if—

(A) the corporation receiving such property was, on the date of the adoption of the plan of liquidation, and has continued to be at all times until the receipt of the property, the owner of stock (in such other corporation) possessing at least 80 per centum of the total combined voting power of all classes of stock entitled to vote and the owner of at least 80 per centum of the total number of shares of all other classes of stock (except nonvoting stock which is limited and preferred as to dividends), and was at no time on or after the date of the adoption of the plan of liquidation and until the receipt of the prop-

erty the owner of a greater percentage of any class of stock than the percentage of such class owned at the time of the receipt of the property; and

(B) no distribution under the liquidation was made before the first day of the first taxable year of the corporation beginning after December 31, 1935; and either

(C) the distribution is by such other corporation in complete cancellation or redemption of all its stock, and the transfer of all the property occurs within the taxable year; in such case the adoption by the shareholders of the resolution under which is authorized the distribution of all the assets of such corporation in complete cancellation or redemption of all its stock, shall be considered an adoption of a plan of liquidation, even though no time for the completion of the transfer of the property is specified in such resolution; or

(D) such distribution is one of a series of distributions by such other corporation in complete cancellation or redemption of all its stock in accordance with a plan of liquidation under which the transfer of all the property under the liquidation is to be completed within three years from the close of the taxable year during which is made the first of the series of distributions under the plan, except that if such transfer is not completed within such period, or if the taxpayer does not continue qualified under subparagraph (A) until the completion of such transfer, no distribution under the plan shall be considered a distribution in complete liquidation.

If such transfer of all the property does not occur within the taxable year the Commissioner

may require of the taxpayer such bond, or waiver of the statute of limitations on assesment and collection, or both, as he may deem necessary to insure, if the transfer of the property is not completed within such three-year period, or if the taxpayer does not continue qualified under subparagraph (A) until the completion of such transfer, the assessment and collection of all income, war-profits, and excess-profits taxes then imposed by law for such taxable year or subsequent taxable years, to the extent attributable to property so received. A distribution otherwise constituting a distribution in complete liquidation within the meaning of this paragraph shall not be considered as not constituting such a distribution merely because it does not constitute a distribution or liquidation within the meaning of the corporate law under which the distribution is made; and for the purposes of this paragraph a transfer of property of such other corporation to the taxpayer shall not be considered as not constituting a distribution (or one of a series of distributions) in complete cancellation or redemption of all the stock of such other corporation, merely because the carrying out of the plan involves (i) the transfer under the plan to the taxpayer by such other corporation of property, not attributable to shares owned by the taxpayer, upon an exchange described in paragraph (4) of this subsection, and (ii) the complete cancellation or redemption under the plan, as a result of exchanges described in paragraph (3) of this subsection, of the shares not owned by the taxpayer.

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STATEMENT

All of the facts were stipulated, and found by the Board as stipulated. (R. 13-16, 20.)

In 1930 taxpayer transferred cut-over timberland to Second Holding Corporation in exchange for all of the latter's stock. Second Holding Corporation was organized solely for the purpose of liquidating the land, and transferring the proceeds to taxpayer. Proceeds were distributed to taxpayer in each of the years 1931, 1932, 1937, and 1938. (R. 20-21.)

The 1938 distribution completed the liquidation of Second Holding Corporation and the corporation was thereupon abandoned. Taxpayer claimed a loss deduction of \$2,000 (the maximum capital loss deduction permitted under Section 117 (d)). It was disallowed by the Commissioner on the theory that no loss could be recognized for tax purposes because of Section 112 (b) (6). (R. 20-21.) The Board of Tax Appeals held Section 112 (b) (6) inapplicable, interpreting the word "property" in that statute as excluding money; the receipts by taxpayer from Second Holding Corporation had been entirely in cash or its equivalent. (R. 22-24.) The Commissioner was appealed. (R. 25-28.)

STATEMENT OF POINTS TO BE URGED

The Board of Tax Appeals erred in deciding that Section 112 (b) (6) of the 1938 Act, which provides for the nonrecognition of gain or loss upon receipt by a parent corporation of "property" distributed in liquidation of a subsidiary corporation, refers to property other than money.

SUMMARY OF ARGUMENT

As ordinarily understood, the word "property" includes money. The Board member incorrectly reasoned that the word was intended to have a narrower meaning in Section 112 (b) (6) of the Revenue Act of 1938. As used in various contexts throughout the statute, the word may mean, broadly, all kinds of property, or, more narrowly, property other than money. Where the narrower meaning has been intended but was not clear from the context, Congress has expressly distinguished money. There is no such express limitation upon "property" as used in Section 112 (b) (6). Money obviously is included in "property" as the word is used in the adjoining Sections 112 (b) (5) and 112 (b) (7), which deal with situations generically similar to those covered by Section 112 (b) (6).

The legislative history of Section 112 (b) (6) makes it quite clear that it was intended to refer to money, among other kinds of property. Section 112 (b) (6) of the 1934 Act, as amended in 1935, expressly excluded money from the scope of the word "property." The excluding words were omitted in Section 112 (b) (6) of the 1936 law (which was re-enacted without change in 1938). At the same time, certain special provisions necessary to properly deal with a differentiation between money and other property, which had been contained in the earlier statute, were omitted from the 1936 statute (and the 1938 statute). Committee Reports with respect to related provisions of the 1938 law in referring to Section 112 (b) (6) state that the word

“property,” as there used, includes money. Any other conclusion would lead to absurd results.

The Commissioner’s position is supported by a consistent administrative practice (evidenced by a published ruling) followed in numerous cases where the revenue has thereby suffered, i. e., cases involving liquidating distributions resulting in gain. The application of Section 112 (b) (6) to such cases is much more frequent than it is to cases like that at bar involving loss.

ARGUMENT

Introductory

Section 112 (b) (6) of the Revenue Act of 1938, *supra*, provides that no gain or loss shall be recognized upon receipt by a corporation “of property distributed in complete liquidation of another corporation” where the recipient owns at least 80 per cent of the stock of the liquidating corporation, and certain other conditions are satisfied. The purpose of this provision, which appeared for the first time in its present form in the Revenue Act of 1936, was to encourage the simplification of corporate structures. See remarks on the floor of Congress concerning Section 112 (b) (6) of the Revenue Act of 1936 by Senator George (Cong. Record, Vol. 80, Part 8, p. 8799), and Congressman Doughton (Cong. Record, Vol. 80, Part 10, p. 10279); *Helvering v. Credit Alliance Corp.*, 316 U. S. 107, 112.

The instant case involves the application of this provision to the liquidation by the taxpayer, Stimson Mill

Company, of its wholly owned subsidiary corporation, Second Holding Corporation. The final liquidating distribution was received by taxpayer in 1938. This distribution, when added to the others previously received, came to less than the taxpayer's basis in the shares of Second Holding Corporation. Accordingly, in its return for 1938, taxpayer claimed a capital loss measured by the difference between its basis and the total of the liquidation distributions, but limited to \$2,000. Revenue Act of 1938, Sections 115 (c) and 117 (d). The Commisisoner disallowed any deduction, claiming that no loss was to be recognized because of Section 112 (b) (6). The Board held Section 112 (b) (6) inapplicable because the distributions in the instant case were in cash or its equivalent. (R. 14.) The Board thought that "property" as used in Section 112 (b) (6) was not broad enough to include money. The decision was by a single member or division; it was not reviewed by the whole Board.¹

The Commissioner believes that the Board member's interpretation was palpably erroneous, and consequently has filed a petition for review.

The word "property" in Section 112 (b) (6) of the 1938 Act includes money

The Supreme Court has observed that "the plain, obvious and rational meaning" of statutory words is always to be preferred to any curious or narrow meaning. *Old Colony R. Co. v. Commissioner*, 284 U. S. 552,

¹ The Commissioner's motion for review by the whole Board was denied.

560. Webster's International Dictionary (1933) defines property as—

that to which a person has a legal title; * * *
an estate, whether in lands, goods, money or in-
tangible rights * * *.

Black's Law Dictionary (3rd ed.) says that "property" is commonly used to denote "everything which is the subject of ownership." As used in statutes other than the Revenue Acts, the word "property" is commonly interpreted to include money. See, e. g., Section 17 of the Bankruptcy Act (U. S. C. 1940 ed., Title 11, Sec. 35) as interpreted in *Bloemcke v. Applegate*, 271 Fed. 595, 600 (C. C. A. 3rd); *Hallagan v. Dowell*, 139 N. W. (Ia.) 883; *Griffin v. Bergeda*, 279 S. W. (Tenn.) 385.²

Therefore, "property" in Section 112 (b) (6) must be taken to include money unless some special legislative purpose to narrow its meaning can be drawn from the context, the surrounding statutory provisions, or the legislative history. The Board member adopted the premise that the surrounding statutory provisions exhibited a carefully segregated use of the word "property," on the one hand, and the word "money," on the

² Conversely, money is frequently used as synonymous with property. *Salt Lake County v. Utah Copper Co.*, 93 F. 2d 127, 132 (C. C. A. 10th). To give the word "money" a narrow sense, and carve it out of "property" as a separate classification would lead to some uncertainty. It is not entirely clear whether "money" would refer purely to cash, or whether it would also include certain equivalents of cash, such as bank deposits, Treasury notes, etc. In a strict legal sense, bank deposits are choses in action and not distinguishable from other rights to collect money on demand, such as demand notes. Incidentally, it is a fair inference that the "money" in the instant case consisted of bank deposits. The record is not specific.

other; he concluded that consistency required the elimination of "money" from "property" in Section 112 (b) (6). (R. 22-23.) We shall demonstrate that both the premise and the conclusion were unsound.

An examination of the entire Revenue Act of 1938 will reveal that the word "property" is used sometimes in its broader sense, as including money, and sometimes in the narrower sense of property of a less liquid character. For instance, in Section 22 (b) (3), which excludes from gross income the value of "property" acquired by gift, bequest, devise, or inheritance, the word obviously has the broader meaning. Cf. Internal Revenue Code, Section 811, which was first enacted as Section 302 of the Revenue Act of 1926 (describing the value of a decedent's gross estate for estate tax purposes as equivalent to the value of "property" belonging to the decedent, or in which he may have certain specified interests).

On the other hand, Section 111 is concerned with measuring the gain or loss realized upon the liquidation of property. It is evident that money, which is the most liquid form of property, cannot be so disposed of as to result in gain or loss. Accordingly, "property" in Section 111 evidently does not refer to money. But this narrower use of the word in Section 111 is dictated by the context and certainly does not argue for a similarly narrow construction in some other context.

Coming specifically to Section 112 (b) we find that "property" is used in a number of subdivisions. In subdivisions (1) and (4) it apparently again has the

narrower meaning, because its context does not suggest any possible need for the broader. But in subdivisions (5), (6) and (7) the broader meaning is demanded.

Section 112 (b) (7), like Section 112 (b) (6), deals with corporate liquidations. The word "property" as there used manifestly includes money. The section provides that in the case of "property" distributed in complete liquidation, the recipient shareholder may, under certain circumstances, elect to have his gain taxed in a specified manner. Subdivisions (E) and (F) then proceed to describe the manner in which the gain from the property received is to be taxed, and in doing so, specially provide for that part of the property received which consists "of money" or of securities acquired after a stated date.

Section 112 (b) (5) immunizes from tax effect the transfer of "property" to a corporation solely in exchange for the corporation's stock, if the amounts of stock received by the transferors are proportionate to their former interests in the "property." It has been held by this Court that the word "property" in Section 112 (b) (5) does include money, so that if "A" transfers \$100,000 in cash to a new corporation, "B" transfers \$100,000 worth of other property to it, and each receives half of the stock, the proportionate interest requirement of Section 112 (b) (5) is met. *Halliburton v. Commissioner*, 78 F. 2d 265. Accord *Portland Oil Co. v. Commissioner*, 109 F. 2d 479, 488-489 (C. C. A. 1st); *Claude Neon Lights v. Commissioner*, 35 B. T. A. 424.³ The Board member in

³ This decision was made by the whole Board, three members dissenting.

the instant case recognized that Section 112 (b) (5), as thus construed, did not fit into his pattern, but dismissed the inconsistency with the remark that Section 112 (b) (5) had a special purpose which was served by that special construction. Singularly enough, the member overlooked a rather similar special purpose in Section 112 (b) (6).

In a sense Section 112 (b) (6) is the converse of Section 112 (b) (5). Section 112 (b) (5) is intended to exempt from tax effect the incorporation of privately owned assets under certain special circumstances. Section 112 (b) (6) is intended to exempt from tax effect the disincorporation of assets under special circumstances. In neither section can any sound reason be discerned for distinguishing between assets which happen to consist wholly or largely of cash and assets which include little or no cash. As this Court pointed out in the *Halliburton* case, most new corporations need at least some cash capital, and it is only logical to apply Section 112 (b) (5), even though the cash capital is contributed by some of the stockholders while the nonliquid capital is contributed by others (provided, of course, the value of the respective contributions is proportionate to the stock received). Similarly, where Section 112 (b) (6) is concerned, the elimination of a subsidiary corporation is as reasonably made tax free when its assets are liquid as when they are in a more frozen state. Either way, the simplification of corporate structures is accomplished in accordance with the statutory purpose. Either way, the tax-exempt gain is the same, that is, it is the difference between the parent's basis in the

subsidiary's stock and the total cash amount or value of the assets received.⁴

The Board member's interpretation of Section 112 (b) (6) stultifies itself by its own futility, since it suggests an obvious avoidance. The subsidiary need only invest its money in some readily salable asset, like high grade corporate bonds or Government securities. These can then be liquidated to the parent and immediately sold without gain or loss because the parent takes the subsidiary's basis under Section 113 (a) (15). Nor could such an expedient be characterized as an evasion to be disregarded for tax purposes; as pointed out, there is as much reason to encourage elimination of liquid subsidiaries as frozen ones; it could only be presumed

⁴ Cash in the subsidiary's hands represents either paid-in capital or the proceeds of property sales or other dealings. If it represents the former, it deserves to be taxed no more than less liquid capital. If it represents the latter, it has been taxed to the subsidiary.

The Board member seemed to think that his interpretation of the statute was necessary in order to prevent a simple means of tax evasion. He postulated the case where a taxpayer corporation buys property for \$X, transfers it to a new corporation for the latter's stock, has the new corporation sell the property for \$3X, and then liquidates the new corporation. The member concluded that the taxpayer should not be permitted to avoid tax on \$2X gain by means of the Commissioner's interpretation of Section 112 (b) (6). (R. 22-23.) The answer is, of course, that the taxpayer would not avoid tax on the \$2X gain in the supposed case, even if the Commissioner's construction were adopted. The subsidiary would pay tax upon gain measured by the parent's basis. Section 113 (a) (8). That tax would reduce the assets to be returned to the parent and, therefore, would come out of the parent's pocket.

that the device was in furtherance of the statutory purpose.

It is apparent, therefore, that subdivisions (5), (6) and (7) of Section 112 (b), closely related in position and subject matter, all use the word "property" as including money. Any narrower use of the word in those subdivisions would frustrate their obvious purpose, lead to absurd results, or contravene their express language.

Indeed, it would appear that wherever "property" has been used in a context permitting the broad meaning including money, it has been intended to have that meaning unless otherwise specifically restricted. *Portland Oil Co. v. Commissioner*, *supra*, pp. 488-489. The whole Board (contrary to the opinion of the member in the instant case) has noted this. *Claude Neon Lights v. Commissioner*, *supra*, p. 430. And it is strikingly exhibited in the legislative history of Section 112 (b) (6) itself, a legislative history which we believe conclusively demonstrates the error of the Board member's construction.

That history is as follows: The original Section 112 (b) (6), differing in many respects from the one involved here, was added to the Revenue Act of 1934 by Section 110 (a) of the Revenue Act of 1935. The original provision never became effective because it was scheduled to operate for the tax years beginning after December 31, 1935 (Revenue Act of 1935, Section 110 (e)), and it was superseded by Section 112 (b) (6) of the Revenue Act of 1936.

But this 1935 statute is significant in that it provided for the tax-free receipt by a corporation of "property (other than money)" from a liquidated subsidiary.⁵

The making of a distinction between property and money in a provision of this kind instantly leads to a special problem for distributions consisting partly of money and partly of other property (as most do). Normally, the recipient of a liquidating distribution is taxed upon gain measured by cash received, plus the value of other property received. If gain from the nonliquid portion of the receipts is to be exempted from tax, but gain from the liquid portion is to be taxed, then some sort of allocation is necessary. There are three obvious alternatives, viz, (1) the money may be first allocated to basis, leaving no taxable gain unless money alone exceeds basis; (2) the nonliquid receipts may be first allocated to basis, making taxable all gain up to the amount of cash received; or (3) the money and nonliquid receipts may be proportionately allocated to basis, making a pro rata part of the gain taxable.

A choice among these methods is not obvious without specific statutory guidance. Such guidance has been given for reorganizations, in connection with which only the receipt of securities is made tax free. See e. g., Revenue Act of 1938, Section 112 (b) (2), (3) and (4). Where the stockholder or participating corporation receives money or other property ("boot") as well as securities, it has long been customary to provide for the second method of calculating taxable gain. Section

⁵ The words "(other than money)" were finally inserted in place of the words "or money" which appeared in one of the earlier drafts of H. R. 8974.

112 (c) (1) of the Revenue Acts of 1938, 1936, 1934, 1932 and 1928; Section 203 (d) (1) of the Revenue Acts of 1926 and 1924. A similar problem is presented if loss, instead of gain, is involved, and for many years it has been provided that no deduction shall be allowed even though "boot" is received. Section 112 (e) of the Revenue Acts of 1938, 1936, 1934, 1932 and 1928; Section 203 (f) of the Revenue Acts of 1926 and 1924.

Section 110 of the 1935 Act recognized these problems in connection with the tax-free liquidation distribution of "property (other than money)" provided for in Section 112 (b) (6) of the 1934 Act, as added by its subsection (a). Accordingly, its subsections (b) and (c) inserted references to Section 112 (b) (6) in both Section 112 (c) (1) and Section 112 (e) of the 1934 Act. Thus the 1935 Act has made express provision for the method of taxation where the property distributed in complete liquidation consisted partly of money or "boot."

Section 112 (b) (6) of the 1936 Act uses the word "property" without the qualifying parenthetical phrase "(other than money)" which appeared in the 1935 provision. This omission is significant in itself. But it is even more significant that reference to Section 112 (b) (6) has been eliminated from Section 112 (c) (1) and Section 112 (e) of the 1936 Act. Thus, the provisions which were urgently needed to define the method of taxation, if money and other property were to be distinguished, were withdrawn from the Revenue Act of 1936. This clearly demonstrates that Congress did not intend to distinguish between money and other property in Section 112 (b) (6) of that Act.

Sections 112 (b) (6), 112 (c) (1) and 112 (e) are identical in the 1936 and 1938 Acts.

Furthermore, the Committee Report with respect to Section 115 (h) of the Revenue Act of 1938 (S. Rep. No. 1567, 75th Cong., 3rd Sess., pp. 18-19 (1939-1 Cum. Bull. (Part 2) 779, 792)) contains the following very significant statement:

In view of the fact that sections 112 (b) (6) and (7) permit the distribution of property (including money), in addition to stock or securities, without the recognition of gain to the distributee, appropriate changes are made in section 115 (h) of the House bill in the interest of added clarity.

In view of the legislative history, the Congressional mandate is plain. "Property" obviously was used in Section 112 (b) (6) in its ordinary sense, so as to include liquid as well as nonliquid assets, and the narrow construction adopted by the Board member must be rejected. The Treasury Department consistently has adhered to the broader meaning in its practice. G. C. M. 19435, 1938-1 Cum. Bull. 176. A published ruling of the department charged with the administration of a law should be given persuasive force in interpreting the law. *White v. Winchester Club*, 315 U. S. 32. And the General Counsel's memorandum involved here deserves more than usual respect for the following reason. Section 112 (b) (6) obviously would encourage gainful liquidations and discourage liquidations resulting in loss. It is a fact that numerous Section 112 (b) (6) liquidations have involved gain and included considerable amounts of cash, while the cases like that at bar, exhibiting loss, have been very

few. Thus, the Bureau ruling has taken a position disadvantageous to the revenue, and to reverse it would adversely affect many more taxpayers than would be helped. Furthermore, it would hurt many of them in a particularly serious way, since they have been liquidated in reliance upon the broad construction of Section 112 (b) (6) and the liquidation cannot now be reversed. Hence, they would find themselves liable to heavy and unanticipated income tax, unless the statute of limitations upon additional assessments had run. Section 112 (b) (6) is a current provision (see Internal Revenue Code) and there would be many cases where the statute of limitations had not run.

In litigation involving the application of Section 112 (b) (6) to gainful liquidations, it has been assumed by the whole Board and the courts that the Treasury was correct in considering money to be "property." *Credit Alliance Corp. v. Commissioner*, 42 B. T. A. 1020, affirmed 122 F. 2d 361 (C. C. A. 4th), 316 U. S. 107; *Commissioner v. Kay Mfg. Corp.*, 122 F. 2d 443 (C. C. A. 2nd), certiorari denied May 4, 1942.

CONCLUSION

For the many reasons stated, the decision of the Board member was erroneous and should be reversed.

Respectfully submitted,

SAMUEL O. CLARK, Jr.,
Assistant Attorney General.

SEWALL KEY,

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Special Assistants to the Attorney General.

SEPTEMBER, 1942.

No. 10202

10
IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

COMMISSIONER OF INTERNAL REVENUE,
Appellant,

vs.

STIMSON MILL COMPANY, *Appellee.*

ON PETITION FOR REVIEW OF THE DECISION OF THE
UNITED STATES BOARD OF TAX APPEALS

BRIEF FOR THE APPELLEE

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COMMISSIONER OF INTERNAL REVENUE,

Appellant,

vs.

STIMSON MILL COMPANY,

Appellee.

No. 10202

ON PETITION FOR REVIEW OF THE DECISION OF THE
UNITED STATES BOARD OF TAX APPEALS

BRIEF FOR THE APPELLEE

OPINION BELOW

The opinion of the Board of Tax Appeals (R. 20-24) is reported at 46 B.T.A. 141.

JURISDICTION

Appellee adopts the statement on jurisdiction set out in Appellant's brief.

QUESTIONS PRESENTED

Section 112(b) (6) of the Revenue Act of 1938 provides that no gain or loss shall be recognized upon receipt by a parent company of property distributed in "complete liquidation," provided certain specified conditions are met.

The issues raised are:

1. There was not a distribution "in complete liquida-

tion" within the meaning of Section 112(b) (6) (A), (B), (C) and (D) of the Revenue Act of 1938.

2. If it is held that there was a distribution "in complete liquidation" within the meaning of said section and subsections the word "property" does not include money.

STATUTE INVOLVED

Revenue Act of 1938, C. 289, 52 Stat. 447:

"SEC. 112. RECOGNITION OF GAIN OR LOSS.

* * * * *

"(b) Exchanges Solely in Kind.—

* * * * *

"(6) Property received by corporation on complete liquidation of another.—No gain or loss shall be recognized upon the receipt by a corporation of property distributed in complete liquidation of another corporation. For the purposes of this paragraph a distribution shall be considered to be in complete liquidation only if—

"(A) The corporation receiving such property was, on the date of the adoption of the plan of liquidation, and has continued to be at all times until the receipt of the property, the owner of stock (in such other corporation) possessing at least 80 per centum of the total combined voting power of all classes of stock entitled to vote and the owner of at least 80 per centum of the total number of shares of all other classes of stock (except nonvoting stock which is limited and preferred as to dividends), and was at no time on or after the date of the adoption of the plan of liquidation and until the receipt of the property the owner of a greater percentage of any class of

stock than the percentage of such class owned at the time of the receipt of the property; and

“(B) No distribution under the liquidation was made before the first day of the first taxable year of the corporation beginning after December 31, 1935; and either

“(C) The distribution is by such other corporation in complete cancellation or redemption of all its stock, and the transfer of all the property occurs within the taxable year; in such case the adoption by the shareholders of the resolution under which is authorized the distribution of all the assets of such corporation in complete cancellation or redemption of all its stock, shall be considered an adoption of a plan of liquidation, even though no time for the completion of the transfer of the property is specified in such resolution; or

“(D) Such distribution is one of a series of distributions by such other corporation in complete cancellation or redemption of all its stock in accordance with a plan of liquidation under which the transfer of all the property under the liquidation is to be completed within three years from the close of the taxable year during which is made the first of the series of distributions under the plan, except that if such transfer is not completed within such period, or if the taxpayer does not continue qualified under subparagraph (A) until the completion of such transfer, no distribution under the plan shall be considered a distribution in complete liquidation.

“If such transfer of all the property does not occur within the taxable year the Commissioner may require of the taxpayer such bond, or waiver of the statute of limitations on assessment and

collection, or both, as he may deem necessary to insure, if the transfer of the property is not completed within such three-year period, or if the taxpayer does not continue qualified under subparagraph (A) until the completion of such transfer, the assessment and collection of all income, war-profits, and excess-profits taxes then imposed by law for such taxable year or subsequent taxable years, to the extent attributable to property so received. A distribution otherwise constituting a distribution in complete liquidation within the meaning of this paragraph shall not be considered as not constituting such a distribution merely because it does not constitute a distribution or liquidation within the meaning of the corporate law under which the distribution is made; and for the purposes of this paragraph a transfer of property of such other corporation to the taxpayer shall not be considered as not constituting a distribution (or one of a series of distributions) in complete cancellation or redemption of all the stock of such other corporation, merely because the carrying out of the plan involves (i) the transfer under the plan to the taxpayer by such other corporation of property, not attributable to shares owned by the taxpayer, upon an exchange described in paragraph (4) of this subsection, and (ii) the complete cancellation or redemption under the plan, as a result of exchanges described in paragraph (3) of this subsection, of the shares not owned by the taxpayer."

STATEMENT

The Appellee adopts the statement of Appellant.

STATEMENT OF POINTS TO BE URGED

Section 112(b) (6) of the Revenue Act of 1938 does not apply because:

1. There was no distribution in "complete liquidation" within the meaning of Section 112(b) (6), (A), (B), (C) and (D) of the Revenue Act of 1938.
2. The term "property" as used in Section 112(b) (6) does not refer to money.

SUMMARY OF ARGUMENT

1. There was no distribution in complete liquidation because:

- A. No plan of liquidation was ever adopted.
- B. A distribution was made before the first day of the first taxable year of the corporation beginning after December 31, 1935, and,
- C. The transfer of all the property did not occur within the taxable year, or
- D. The distribution was not in accordance with a plan of liquidation under which the transfer of all of the property under the liquidation was to be completed within three years from the close of the taxable year during which is made the first of a series of distributions under the plan.

2. The reading of the entire Supplement B, Sections 111 to 121 all relating to the subject of computation of net income, repeatedly refers to "property" and to "money." The legislative intent to differentiate between property and money is thus shown.

From the Committee reports referred to in Appellant's brief, in relation to the legislative history of the Act, interpretation Appellant would draw therefrom does not necessarily follow.

ARGUMENT

A. Introduction

In its 1938 income tax return Appellee claimed a capital loss measured by the difference between its tax basis and the total of distributions received by it except that the loss claimed was limited to \$2,000 pursuant to other provisions of the 1938 Act not material to any issue herein. The only question is whether the Commissioner was correct in disallowing the loss upon the ground that Section 112(b)(6) of the 1938 Revenue Act applies to the facts stipulated to by both parties.

The Appellee has at all times contended, and before the Board of Tax Appeals urged, that the facts definitely preclude the application of Section 112(b)(6) (R. 18). Although the Board of Tax Appeals predicated its decision upon the interpretation of the word "property," as used in Section 112(b)(6), as excluding money, Appellee's principal contentions were not predicated upon the interpretation of the word "property" appearing in Section 112(b)(6). While Appellee believes that the Board of Tax Appeals correctly interpreted the word "property" as not including money, Appellee again, as it did before the Board of Tax Appeals, will urge that the first and real issue is, under the facts of this case, was there a distribution in complete liquidation within the provision of Section 112(b)(6)? A decision as to whether the word "property" as used in Section 112(b)(6) includes money, is necessary only if it is held that there was a distribution "in complete liquidation" within the provisions of Section 112(b)(6), (A), (B), (C) and (D).

Before the question as to whether or not the word "property," as used in Section 112(b)(6), includes money is considered, it is necessary to determine whether there was a distribution "in complete liquidation" within the meaning of said section. This question is not argued in Appellant's brief.

Were it not for the provisions of Section 112 every gain in complete liquidation would be taxable and every loss in complete liquidation deductible. Section 112(b)(6) prescribes specific conditions that must be met for the taxpayer to avoid tax on certain gains. These same conditions must be present if the claim for loss is to be denied.

To state the statute is to state the answer. No extended argument is necessary. No previously decided cases raising this issue have been found by Appellee, probably for the reason that the provisions of Section 112(b)(6), (A), (B), (C) and (D) are so clear as not to require interpretations.

Section 112(b)(6) provides "for the purpose of this paragraph a distribution shall be considered to be in complete liquidation *only if * * **" (Emphasis supplied) the following conditions are met:

1. The adoption of a plan of liquidation (112(b)(6)(A) and (C) or (D)) and
2. The corporation receiving the distribution was at all times from the adoption of a plan of liquidation to the date of final distribution in liquidation the owner of at least 80% of the combined voting power of all the capital stock (112(b)(6)(A)) and
3. "No distribution under the liquidation was made before the first day of the first taxable year of

the corporation beginning after December 31, 1935" (112(b)(6)(B)) and

4. The distribution occur within the taxable year after the adoption of the plan (112(b)(6)(C)) or
5. If the distribution is one of a series in accordance with the plan of liquidation under which the liquidation is to be completed within "three years from the close of the taxable year during which" the first of the series of distribution under the plan is made (112(b)(6)(D)).

B. Distributions were made before December 31, 1935

Section 112(b)(6)(B) specifically requires that in order for the section to apply "no distribution under the liquidation was made before the first day of the first taxable year of the corporation beginning after December 31, 1935 and * * *." (The conditions set forth in subsections (C) or (D) also apply.)

Distributions were made by Second-Holding Corporation in 1931, 1932, 1937 and 1938 (R. 14). This fact standing alone precludes the application of Section 112(b)(6).

C. No plan of liquidation adopted within the provisions of Section 112(b)(6)(C) or (D)

Sub-sections (C) and (D) are stated in the alternative. Either the distribution in "complete cancellation or redemption of all" the stock must occur within "the taxable year" or "within three years * * * from the close of the taxable year during which is made the first of a series of distributions" under a plan of liquidation adopted by resolution of the stockholders.

Second-Holding Corporation was organized in 1930

for the sole purpose of selling certain real property acquired in exchange for its capital stock. The proceeds were to be distributed to the Appellee. Such distributions were made in 1931, 1932, 1937 and 1938 (R. 14).

Unquestionably the 1938 distribution was one of a series over a period of eight or nine years. During this period of time Second-Holding Corporation served its purpose. It was never dissolved. It was abandoned (R. 15) and the authorization therefor secured six months after the final distribution (R. 14). The stipulation of the parties is conclusive of the fact that there never was a plan of liquidation within the intentment of Section 112(b) (6). Paragraph 13 states:

“13. The minute book of Second-Holding Corporation contains no record of any meeting wherein either liquidation or dissolution was discussed or wherein any distributions of any kind were authorized.” (R. 15)

and paragraph 14 further states:

“14. No steps were taken to dissolve Second-Holding Corporation, but it was abandoned forthwith, immediately after the meeting, the minutes of which is attached as Exhibit A.” (R. 15)

If it can be said that any “plan” of liquidation ever existed, it must be found in the purpose for which Second-Holding Corporation was organized and such a plan would not fall within the limits of Section 112(b) (6) (C) or (D). The distributions were in pursuance of its purpose and extended over a period of eight years.

In conclusion Appellee submits that there were no distributions “in complete liquidation” because the

facts do not bring the case within subsections (B) and (C) or (D) of Section 112(b) (6).

D. Property does not include money

The Board of Tax Appeals decision was predicated upon an interpretation of the word "property" as excluding "money." The fair intendment of the statute is set out in the cogent reasoning of Member Sternhagen. We can do no better than adopt his opinion in this respect.

Appellant, being hard pressed to meet this argument, has attempted to gain support for his position from a Committee Report of the 75th Congress quoted on page 17 of his brief. The weakness of his argument rests in the fact that:

1. Section 112(b) (6) was introduced into the Revenue Statute by the Act of 1936 and was re-enacted without change in the Revenue Act of 1938.
2. The Revenue Act of 1938 introduced Section 112(b) (7) into the tax structure. This subsection provides for the non-recognition of gain on certain distributions in liquidation *except to the extent that money or certain recently acquired securities are distributed*.¹

¹Section 112(b) (7) Revenue Act of 1938 Public—No. 554—75th Congress, Chapter 289, 3rd Session (52 Stat. 447):

"(A) *General Rule*.—In the case of property distributed in complete liquidation of a domestic corporation, if—

- (i) the liquidation is made in pursuance of a plan of liquidation adopted after the date of the enactment of this Act, whether the taxable year of the corporation began on, before, or after January 1, 1938; and

3. The quotation from the Committee Report concerns changes initiated in the Revenue Act of 1938 (Appellant's brief page 17) and is obviously in error in stating that Section 112(b) (7)

(ii) the distribution is in complete cancellation or redemption of all the stock, and the transfer of all the property under the liquidation occurs within the month of December, 1938—

then in the case of each qualified electing shareholder (as defined in subparagraph (c)) gain upon the shares owned by him at the time of the adoption of the plan of liquidation shall be recognized only to the extent provided in subparagraphs (E) and (F).

“(B) * * *

“(C) * * *

“(D) * * *

“(E) *Noncorporate Shareholders*.—In the case of a qualified electing shareholder other than a corporation—

(i) There shall be recognized, and taxed as a dividend, so much of the gain as is not in excess of his ratable share of the earnings and profits of the corporation accumulated after February 28, 1913, such earnings and profits to be determined as of December 31, 1938, but without diminution by reason of distributions made during the month of December, 1938; and

(ii) There shall be recognized, and taxed as short-term or long-term capital gain, as the case may be, so much of the remainder of the gain as is not in excess of the amount by which the value of that portion of the assets received by him which consists of *money*, or of stock or securities acquired by the corporation after April 9, 1938, exceeds his ratable share of such earnings and profits. (Emphasis supplied)

“(F) *Corporate Shareholders*.—In the case of a qualified electing shareholder which is a corporation the

permits the distribution of money without recognition of gain to the distributee.²

4. Section 115(h) (Revenue Act of 1938) which is the subject of the comment in the Committee Report (Appellant's brief page 17) refers to "property" and "money" in the alternative rather than "property" as including "money." Its effect is merely to give equal treatment to both in the event no gain or loss is recognized on the distribution.³

gain shall be recognized only to the extent of the greater of the two following—

- (i) The portion of the assets received by it which consists of *money*, or of stock or securities acquired by the liquidating corporation after April 9, 1938; or

- (ii) Its ratable share of the earnings and profits of the liquidating corporation accumulated after February 28, 1913, such earnings and profits to be determined as of December 31, 1938, but without diminution by reason of distributions made during the month of December, 1938. (Emphasis supplied)

²See Note (1) *supra*.

³Section 115 Revenue Act of 1938. Public—No. 554—75th Congress, Chapter 289, 3rd Session (52 Stat. 447):

"(h) *Effect on Earnings and Profits of Distributions of Stock*.—The distribution (whether before January 1, 1938, or on or after such date) to a distributee by or on behalf of a corporation of its stock or securities, of stock or securities in another corporation, or of *property or money*, shall not be considered a distribution of earnings or profits of any corporation (Emphasis supplied)—

- (1) if no gain to such distributee from the receipt of such stock or securities, *property or money*, was recognized by law, or (Emphasis supplied)

- (2) if the distribution was not subject to tax in

Little weight can be given to a Committee Report as interpretative of a reenactment of a prior law (Section 112(b)(6) Revenue Act of 1938) wherein the presence of such an obvious mis-interpretation of a current enactment (Section 112(b)(7) Revenue Act of 1938) appears. Such weight as might otherwise attach to this Committee Report is nullified by the language of the Amended Section 115(h).⁴

CONCLUSION

Appellee submits that there is no deficiency in income tax for the calendar year 1938 for the reasons herein stated.

Respectfully submitted,

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the hands of such distributee because it did not constitute income to him within the meaning of the Sixteenth Amendment to the Constitution or because exempt to him under Section 115(f) of the Revenue Act of 1934 or a corresponding provision of a prior Revenue Act.

“As used in this subsection the term ‘stock or securities’ includes right to acquire stock or securities.”

⁴See Note 3.

